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No. 98

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

MARYLAND PORT AUTHORITY, BALTIMORE ASSOCIATION OF COMMERCE, DELAWARE RIVER PORT AUTHORITY, THE CITY OF PHILADELPHIA, VIRGINIA STATE PORTS AUTHORITY, AND NORFOLK PORT AND INDUSTRIAL AUTHORITY,
Appellants,

v.

BOSTON AND MAINE RAILROAD, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the District Court (WOODBURY, SWEENEY and FORD, JJ.) is officially reported in 202 F. Supp. 830 and is printed in the record at pp. 3994-4005. The reports of the Interstate Commerce Commission dated December 5, 1960, and June 15, 1961, respectively, are officially reported as *Equalization of Rates at North Atlantic Ports*, 311 I.C.C. 689 and 314 I.C.C. 185, respectively. They are also printed in the record at pp. 3738-3820 and pp. 3836-3857.

JURISDICTION

This action was brought under 28 U.S.C. §1336 to set aside and enjoin an order of the Interstate Commerce Commission. The judgment of the District Court enjoining the order of the Commission was entered on February 23, 1962, and these appellants filed their notice of appeal in that court on March 30, 1962. Jurisdiction to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *Virginian Railway v. United States*, 272 U.S. 658; *United States v. Pennsylvania Railroad Company*, 323 U.S. 612. On June 11, 1962, this Court noted probable jurisdiction (R. 4027).

STATUTES INVOLVED

The statutory provisions involved, the National Transportation Policy (49 U.S.C. preceding §§1, 301, 901, 1001) and Sections 1(5), 3(1), 4(1), 15(1), 15(7), and 15a(2) of the Interstate Commerce Act, as amended (49 U.S.C. §§1(5), 3(1), 4(1), 15(1), 15(7), and 15a(2)) are set forth in Appendix B hereto.

THE QUESTION PRESENTED

Did the District Court err (1) in overruling a decision of the Interstate Commerce Commission which rejected as unlawful a proposal on the part of certain railroads serving the ports of New York, Boston, Albany, and Portland to destroy a differential rate relation that has obtained for 85 years in the movement of import-export traffic between the named ports and Philadelphia, Baltimore, and Hampton Roads and so-called differential territory and (2) in requiring the establishment of equalized rates?

STATEMENT OF THE CASE

For more than three-quarters of a century the relationship of the rail rates on export-import traffic moving be-

tween the ports of the North Atlantic range and the great industrial and commercial area lying between the Mississippi, the Ohio, the Great Lakes and the Buffalo-Pittsburgh line has been governed by the North Atlantic Ports Adjustment, which generally conforms to the provisions of an agreement entered into on April 5, 1877 by the presidents of the major railroads serving the affected territory.* That agreement provided as to both domestic and export-import traffic that the Baltimore rate should be 3¢ (and the Philadelphia rate 2¢) per hundred pounds under that of New York (except for first and second-class freight westbound, as to which the agreed differentials were 8¢ from Baltimore and 6¢ from Philadelphia less per hundred pounds than from New York) and that the Boston rates should not be lower than the New York rates.

Railroads serving the ports of Hampton Roads subsequently established Baltimore rates on export-import traffic between those ports and points in differential territory lying west of the Sandusky line, and railroads serving the port of Portland (which were faced with the competition of Canadian carriers) established Baltimore rates on import traffic moving from that port through Canada to differential territory (See App. A *infra*, pp. 79, 87-88). In 1936 the Commission determined that the port of Albany was entitled to the same rates as Philadelphia on export

* For the full text of the agreement, see R. 7903-1904. The application of the differentials to domestic freight for local deliveries at the port cities remained in effect until the decision of the Commission in *Eastern Class-Rate Investigation*, 164 I.C.C. 314 (1930), 171 I.C.C. 481 (1931) prescribed new domestic rates based essentially on distance. See Appendix A *infra*, p. 95. The differential on grain movements was later reduced to one and a half cents per 100 pounds Baltimore under New York and one cent per 100 pounds Philadelphia under New York, *Export and Domestic Rates*, 8 I.C.C. 214, 228 (1899). Differential territory is defined more exactly in the original report of the Commission in the present case (R. 3740).

import traffic moving to and from differential territory (See App. A *infra*, p. 96).

Six years ago the rail carriers serving the ports of New York, Albany, Boston and Portland (to which we shall refer hereinafter from time to time as the "northern tier ports") filed tariffs to become effective July 10, 1956, reducing to the Baltimore level the rates between those ports and differential territory on all export-import traffic except coal, coke and iron ore. The appellant railroads, which serve the ports of Philadelphia, Baltimore and Hampton Roads (the "southern tier ports"), promptly protested the proposed rates and at the same time filed tariffs reducing their rates by the amount necessary to maintain the existing differentials. These matching rate reductions were in turn protested by the appellee railroads. Thereafter the appellant and appellee port and commercial interests intervened on the side of their respective carriers.

The Commission, proceeding under Section 15(7) of the Interstate Commerce Act, suspended all of the proposed rates and began an investigation into their lawfulness. The testimony of the first witness produced by the appellee railroads (hereinafter referred to as the "northern railroads" since they serve the northern tier ports) made it clear that their sole purpose in filing the reduced rates to the northern tier ports was to abolish the long-existing differentials and to establish a new relationship of parity between all the North Atlantic ports (R. 1615-1617). The Commission expressly found that this was the purpose of the proposed rates (R. 3739).

The appellant railroads, which serve the southern ports (and are hereinafter called "the southern railroads"), made it equally clear that their sole purpose in proposing matching reductions to the southern tier ports was to preserve

the existing differential rate structure and the Commission so found (R. 3740, 3753).

It should be understood at once that the issue before the Commission was not whether carriers may *voluntarily* equalize rates between the North Atlantic ports and differential territory. This case is not one in which the railroads concerned have agreed on equalization — quite the contrary. While the northern railroads seek equalization, the southern railroads oppose it strongly and wish to preserve the existing rate structure. Thus the question before the Commission was whether the southern railroads could be *compelled* against their will to establish a relationship of parity.

Again, the question before the Commission was not solely whether the reduced rates proposed by the northern railroads are compensatory and not unduly prejudicial to the southern tier ports, although both aspects of that question would require affirmative answers before the Commission could properly permit the proposed rates to become effective. Here it is perfectly clear that the only reason the northern carriers desire to reduce their rates to the northern tier ports is in order to establish a parity relationship between all the North Atlantic ports. Indeed, they have made no effort to justify their proposal on any other basis. The southern carriers have filed matching reductions for the sole purpose of maintaining the existing rate structure. The Commission was thus faced with a rate war — actual and not just potential. In such a situation an important issue before the Commission was whether to exercise its power under Section 15 of the statute to prescribe a relationship even though none of the proposed rates taken by themselves would have violated any other express statutory provision, or whether to sit back and let

the carriers fight it out until one or the other set of rates reached the non-compensatory level.*

On these issues exhaustive hearings were held before a hearing examiner (Marion L. Boat), who on October 9, 1959, filed a comprehensive report (R. 3669-3736) recommending that all the proposed rates be canceled. Exceptions to the examiner's report were filed and argued before the full Commission which on December 5, 1960, handed down its report and order directing that all the proposed rates be canceled. After analyzing with great care the extensive and conflicting cost evidence submitted by the protestant and respondent railroads, the Commission concluded that the revenue from the proposed rates as applied to existing traffic at New York "would equal or exceed by a very small margin the estimated out-of-pocket costs," but that the presentation of costs in the record was not adequate to determine "whether the proposed rates would be reasonably compensatory", or whether "other traffic would be forced to absorb a larger portion of the constant costs in order to maintain a national transportation system conforming to the ultimate objectives of the national transportation policy" (R. 3797).

The Commission stated, however, that "the sole issue is one of lawful rate relationship" (R. 3753). On that point the Commission found:

> "The present differentials are smaller than they would be if allowed to be set by competitive factors, and also much smaller, relatively, than when initially established. As hereinbefore mentioned, protestant railroads have filed a counter proposal, in the event that the respondents' rates are found lawful; they propose

* The Commission referred specifically to sections 1, 3(1) and 15 a(2) as being of "controlling importance" (R. 3805). These statutory provisions are set out in Appendix B, infra at pp. 101, 102 and 105.

to reduce their rates between southern tier ports and the same interior territory by the same amounts as proposed by the respondents. The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports, are firmly established. Thus, approval of respondents' proposed rates would require alternate approval of protestants' proposed rates. This might result in the rates gravitating to their lowest possible level and in a needless dissipation of carrier revenues. We have been given the power to fix rates, among other reasons, for the purpose of preventing destructive competition and promoting the financial stability of the regulated carriers. Failure to observe our obligations in the exercise of that power would find us remiss in our duties. The present differentials have long served to retain a reasonable competitive relationship between the principal port groups and should be maintained" (R. 3805-3806).

The Commission also found that

"* * * considering the volume and character of the traffic disclosed by the traffic study, and other evidence of circumstances which induce or deter the flow of the subject traffic, undue diversion from those ports to New York, at least of most types of that traffic, would result from the proposed equalization" (R. 3806).

Accordingly, the Commission found that the rates proposed by the northern railroads were

"* * * not shown to be reasonably related to the present rates on like traffic between the same interior points and the southern tier ports, and that the proposed rates would result in undue preference of and advantage to the northern tier ports as a group and in undue prejudice and disadvantage to the southern tier ports" (R. 3806-3807).

The Commission also found that the rates to the southern tier ports proposed by the southern carriers had not been

shown to be just and reasonable, but made it clear that a different finding would have been made had the rates to the northern ports not been found to be unlawful (R. 3753, 3807).

An appeal was then taken to the District Court for the District of Massachusetts, and, on behalf of the port interests of the port of Boston and the railroads primarily serving that port, the contention was made that the Commission had erred in failing to treat the proposed rates between differential territory and Boston separately and independently. The Department of Justice filed an answer supporting this contention, and the Commission thereupon reopened the proceedings "for reconsideration on the present record of the lawfulness of the proposed rates separately and independently on traffic to and from each northern tier port" (R. 3835-3836).

On June 15, 1961, the Commission filed its report on reconsideration in which it pointed out that in the proceedings before it the railroads and port interests of Boston had joined together with the other northern tier ports in treating their proposal as an integral part of a broad group adjustment in which all the North Atlantic ports were treated as a unit (R. 3838-3839). Nevertheless, the Commission proceeded to consider the proposed rates to each of the northern tier ports separately. As to Boston it found that (R. 3852):

> "Boston's rates, as proposed, would be lower than the present rates to and from Albany, and also lower than the present rates to and from New York and Philadelphia. Rates lower to or from Boston than to or from the other ports just mentioned, over some routes, would be in violation of the long-and-short haul provisions of section 4 of the Interstate Commerce Act."

* * * * * *

(R. 3854) "While in the instant proceeding there is strong insistence by the respondents and the ports supporting them upon rate parity, equally strong are the claims of their opponents, fully substantiated of record, as to the opponents' geographical, transportation, and cost advantages. In general, in the rare instances where rate changes in port relationships have been required by us, distance has been an important consideration [citing cases]. Here, as stated, the distance disadvantages of Boston, for example, are 223 miles over Baltimore, 171 miles over Philadelphia, and 117 miles over New York; and the latter port is 106 miles more distant than Baltimore. Such great differences in distance, under the circumstances here revealed, may not be ignored without running counter to the provisions of section 3(1) of the act."

The Commission then found (R. 3855):

"* * * the proposed rates to and from Albany, New York, Boston, and Portland, separately and collectively, are not shown to be reasonably related to the present rates on like traffic to and from the southern tier ports, and would cause undue preference of and advantage to the named ports and undue prejudice and disadvantage to the southern tier ports".

Following the report of the Commission on reconsideration the case in the District Court was resumed, amended pleadings were filed, and after argument the Court handed down an opinion (per SWEENEY, Ch. J.) finding that the order of the Commission should be set aside insofar as it upheld the existing differential rate structure. Judge SWEENEY first dealt with the question whether the rates proposed by the northern carriers had been shown to be just and reasonable. He noted that the Commission had "refused to find the rates compensatory" (R. 4001). Nevertheless, he proceeded to hold that the Commission

should have found the proposed rates to be just and reasonable

Judge SWEENEY then turned to the Commission's conclusion that parity rates would unduly prejudice and disadvantage the southern tier ports and held that it was without rational basis. In support of this holding he found that the Commission had not given "due weight to the interests of shippers, receivers, carriers, and inland localities" (R. 4003). He also found that the Commission should have given no weight to the distance advantages of the port of Baltimore.

On February 16, 1962, a judgment was entered in the District Court setting aside and enjoining enforcement of the order of the Interstate Commerce Commission "insofar as it directs the cancellation of schedules proposing differential-eliminating rates to and from the ports of Portland, Maine, Boston, Massachusetts, Albany and New York, New York, denies fourth-section application No. 32204, and prevents differential-eliminating rates from becoming effective" (R. 4006). It is from this judgment that this appeal is taken.

The importance of this appeal to the southern tier ports, on whose behalf this brief is filed, can hardly be exaggerated. They serve communities whose economies are largely dependent upon the export-import traffic which moves through them, and this traffic in considerable part originates in or is destined to the affected territory. They are faced with the overwhelming competition of New York, "the world's greatest port" (R. 2514); and if, as the District Court has held, they must now be denied all recognition of the only advantages which they possess in the competitive struggle with that port, the effect on the communities which they serve cannot fail to be disastrous.

STATEMENT OF THE ISSUES

From the foregoing we think it is apparent that the Commission's decision rested on two fundamental propositions:

First: That since the claims of the southern carriers as to their geographical, transportation and cost advantages were fully substantiated by the record and their need for a differential in order to compete successfully with the northern carriers had been demonstrated, the existing differential rate structure was fair and the southern carriers could not be prevented from making matching reductions if the reduced rates proposed by the northern carriers were permitted to go into effect, and therefore unless cancelation of all the proposed rates was ordered, needless dissipation of carrier revenues would result.

Second: That the evidence as to the volume and character of the traffic moving between the North Atlantic ports and differential territory, (particularly the traffic studies) as well as the other circumstances which would affect the flow of that traffic, demonstrated that the rates proposed by the northern carriers would result in undue diversion of traffic from the southern tier ports and would cause them undue prejudice and disadvantage.

The District Court completely ignored the first ground of the Commission's decision, and its opinion made no reference whatsoever to the Commission's findings on this point. As to the second ground, the District Court found that the Commission's conclusion was irrational and that the Commission was bound as a matter of law to find that the proposed parity rates were lawful.

Thus the issues on the present appeal are:

1. Was there a rational basis for the Commission's conclusion that the differential was a fair relationship and

that the matching reductions proposed by the southern carriers to maintain the existing differential should not be prevented from going into effect if the reductions proposed by the northern carriers were permitted to become effective? If so, was the Commission justified in ordering cancelation of all the proposed rates in order to prevent a useless dissipation of carrier revenues?

2. Was there a rational basis for the Commission's conclusion that a parity relationship was unlawful since it would result in undue prejudice and disadvantage to the southern tier ports? In that connection was the District Court justified in holding that the Commission had given undue weight to the distance disadvantages of the northern ports and insufficient weight to the interests of shippers, receivers, carriers and inland localities?

3. Even if there had been no rational basis for either of the Commission's principal holdings, was the court justified in disregarding the Commission's finding that the proposed rates had not been shown to be compensatory and in making its own finding that the rates were just and reasonable?

SUMMARY OF THE ARGUMENT

I.

The Commission found that the long-existing rate relationship applicable to the movement of traffic between the North Atlantic ports and differential territory which is embodied in the North Atlantic Ports Adjustment continues to be fair and reasonable. This finding was supported by detailed subsidiary findings which were based on a careful analysis of statistical data and traffic studies showing the movement of traffic through the several ports, on the evidence as to the facilities and services available at

those ports, on the testimony of shippers and traffic handlers indicating preference for the northern tier ports, on the evidence as to the greater dependence of the southern tier ports on traffic moving to and from differential territory, and on the evidence as to transportation conditions affecting the movement of traffic through the ports and particularly the geographical and cost advantages of the southern tier ports (*infra*, pp. 17-41).

In the District Court the appellees assailed this finding of the Commission on two grounds. First, they argued that equalization of ocean rates had eliminated the only justification for the North Atlantic Ports Adjustment, since the sole purpose of that adjustment was to offset ocean differentials by corresponding inland differentials. The District Court adopted this argument. In so doing, it misread the facts of history and misunderstood reports handed down by the Commission over a long series of years (*infra*, pp. 19-22).

Secondly, the appellees argued in the District Court that since World War II, changes have taken place in the flow of traffic through the North Atlantic ports which make the existing differential rate structure unfair to the northern tier ports. The District Court adopted this argument also, in spite of the fact that the Commission, after an exhaustive analysis of the evidence in the record bearing on this question, had found to the precise contrary. The Commission's finding was amply supported by the record and by detailed subsidiary findings (*infra*, pp. 22-41). In substituting its own findings to the contrary for that of the Commission, the District Court clearly exceeded the accepted bounds of judicial review of administrative action. *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573 (*infra*, p. 54).

II.

The Commission, after weighing all the relevant factors determined that the existing differential relationship is a fair and reasonable one, and that it would not be justified in preventing the southern carriers from lowering their rates so as to maintain it. In this case the southern carriers have actually filed matching rate reductions for that express purpose. Thus, if the Commission had permitted the rates filed by the northern carriers to become effective, it would have been faced with a rate war, which the southern carriers would have been bound to win because of their lower costs. Under such circumstances, Section 15 of the Interstate Commerce Act confers full power on the Commission to order cancelation of all the proposed rates, thereby preventing the pointless dissipation of badly needed carrier revenues. *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499; *Youngstown Sheet & Tube Co. v. United States*, 295 U.S. 476; *New York Central Railroad Company v. United States*, 207 F. Supp. 483 (S.D.N.Y. 1962) (*infra*, pp. 42-51).

III.

In addition to finding that the existing differential rate structure was lawful, the Commission went further and affirmatively found that parity rates would be unlawful since they would result in undue diversion of traffic from the southern tier ports in violation of Section 3(1) of the Interstate Commerce Act. This conclusion was based on the detailed subsidiary findings described in the first paragraph of I above. The District Court held that the Commission's finding of undue prejudice was arbitrary and without rational basis. In so holding, the District Court usurped the functions of the Commission. *Board of Trade v. United States*, 314 U.S. 534, 536 (*infra*, p. 51).

Moreover, the specific grounds advanced by the District Court in support of its holding were plainly erroneous. It is not true, as stated by the District Court, that the Commission's "conclusion that the proposed rates violate Section 3(1) relies on a single subsidiary finding — the distance disadvantages of the northern tier ports." Rather it was based on many factors developed by appraisal of a voluminous record revealing a complex factual situation which only an expert and experienced body such as the Commission is equipped to evaluate (*infra*, pp. 52-54). It is also untrue that the Commission made no cost or value findings, as stated by the District Court. Such findings were explicitly made by the Commission (*infra*, pp. 54-55).

The District Court's finding that the Commission had not given "due weight" to the interests of shippers, receivers, carriers and inland localities is equally unjustified, since the Commission carefully weighed all of these factors. Here the District Court seems to have based its holding on a misconstruction of the statute (*infra*, pp. 55-63).

Finally, the District Court based its holding on the erroneous assumption that except in the present case, the Commission has never given weight to distance factors in formulating port adjustments. A study of the Commission's reports discloses that the Commission has consistently recognized that distance is an important factor in justifying the North Atlantic Ports Adjustment and has given weight to considerations of distance in connection with other port adjustments (*infra*, pp. 21-22, 64-66).

IV.

The District Court made its own finding that the rates proposed by the northern carriers to the northern tier ports were just and reasonable. The Commission made no

such finding. On the contrary, the Commission found that the cost evidence in the record showed that the proposed rates would produce at best a small margin above out-of-pocket costs and was not sufficiently complete to permit a finding that the rates would be compensatory. Because of this inconclusive showing and because the Commission has found that the proposed rates were not reasonably related to the present rates on like traffic to and from the southern tier ports, and would cause undue prejudice and disadvantage to those ports, the Commission made no finding as to whether the rates were otherwise just and reasonable. In making its own finding on this point, the District Court clearly exceeded the proper bounds of judicial review, *Illinois Commerce Commission v. United States*, 292 U.S. 474 (*infra*, pp. 67-70).

ARGUMENT

I.

The Commission's Finding that the Existing Rate Structure Continues to be Fair and Reasonable was Based on Detailed Subsidiary Findings Which Are Supported by the Record.

The North Atlantic Ports Adjustment had its origin in a voluntary agreement of carriers made 85 years ago but regardless of its origin, it has become a child of the Commission by adoption. While the Commission's first scrutiny of the adjustment was limited to the question whether it established a lawful relationship between the ports of Boston, New York, Philadelphia and Baltimore (the Commission held that it did, *New York Produce Exchange v. B & O. R.R., et al.*, 7 I.C.C. 612 (1898)), the Commission subsequently in two arbitrations recommended that the carriers continue the adjustment substantially without change. *In the Matter of Differential Freight Rates to and from North Atlantic Ports*, 11 I.C.C. 13 (1905); *In the Matter of Import Rates*, 24 I.C.C. 78, 678 (1912) and 27 I.C.C. 245 (1913). Thereafter the Commission has consistently refused to disturb it, although its legality and fairness has repeatedly been challenged by diverse interests. As the Commission said in one such case, *City of Philadelphia v. Baltimore & O. R. Co.*, 231 I.C.C. 21 (1938), at page 34:

> "The differential port-rate adjustment at the ports of Boston, New York, Philadelphia and Baltimore is the outgrowth of a long period of competitive trife. The relations between these port rates have stood unchanged for many years and should not be overthrown except upon definite proof that they are unlawful. We have repeatedly refused to disturb them and no evidence has here been presented which would warrant a different course."

In its original report in this case the Commission, after a careful analysis of the testimony and exhibits, reached the following conclusion:

> "The present differentials have long served to retain a reasonable competitive relationship between the principal port groups and should be maintained" (R. 3806).

In so holding, the Commission found that the appellees had failed to meet the burden which concededly rested upon them.*

This conclusion of the Commission was supported by detailed subsidiary findings which, in turn, were based on statistical data and traffic studies showing the movement of traffic through the several ports, on testimony as to the facilities and services available at those ports, on the testimony of shippers and traffic handlers indicating preference for the northern tier ports, on testimony as to the greater dependence of the southern tier ports on traffic moving to and from differential territory and on the admitted geographical disadvantages and higher cost of moving traffic through the northern tier ports (R. 3753-3803).

The District Court held that this conclusion of the Commission was without rational basis. While that holding was based in part on conclusions of law which we shall hereafter discuss, it was obviously influenced by two arguments advanced by the appellees which were designed to show first, that the basis of the North Atlantic Ports Adjustment

* At page 12 of the brief filed by the Port of New York Authority, et al., when this case was before the Commission (I&S 6015, *"Equalization of Rates From and To North Atlantic Ports"*), the following statement appears:

> "The carriers serving New York should not, of course, be allowed to change anything which had been in existence as long as the Port Differential rail rate structure without good cause."

** The subsidiary findings of the Commission and the evidence supporting those findings are reviewed in detail (*infra*, at pp. 22-41).

had disappeared and second, that as a result of this change of conditions, the North Atlantic Port Adjustment had become unduly prejudicial to the northern tier ports and to the carriers which serve them. We believe the discussion of these two questions will develop the considerations which guided the Commission in reaching its conclusions in the present case and for this reason we propose to deal with them at the outset.

A. The Historical Argument

In the District Court, appellees argued that the differentials provided for in the North Atlantic Ports Adjustment were based on a policy of equalization and established inland rates solely for the purpose of offsetting ocean differentials, that until 1935 they served that purpose, but that since 1935 ocean rates to the North Atlantic ports have been equalized, and that the reason and, with it, the justification for the differentials has therefore vanished. The District Court adopted this argument and, by the same token, asserted that the North Atlantic Ports Adjustment had never been based on distance (R. 4003).

In Appendix A to this brief we have collected and analyzed the relevant material bearing on the origin and subsequent history of the North Atlantic Ports Adjustment (*infra*, pp. 75-99). We venture to assert that anyone who reads the material gathered there is bound to recognize that the District Court has misread the facts of history.

In *Maritime Association, Boston Chamber of Commerce v. Ann Arbor Railroad Company*, 95 I.C.C. 539 (1925), the Commission said (p. 567):

> "It may be conceded that they [the port differentials] are the result of compromise, arbitration, and agreement resorted to as the only means so far found of averting rate wars."

This statement is supported by the testimony of those who negotiated the original agreement of 1877 as well as by the fact that that agreement superseded one which provided for a much greater differential in favor of Baltimore and Philadelphia (see App. A *infra*, pp. 75-77). It would seem entirely clear, therefore, that the differential rate structure which was incorporated in the original agreement of 1877 was not intended simply to equalize ocean differentials. The text of this agreement bears this out, since the rate differences agreed upon were to apply to "freight shipped for local consumption" at the port cities, which could not possibly be affected by the ocean differentials in any manner (R. 1903). Further, the agreed rail rate differentials on westbound traffic differed materially from those on eastbound traffic, without any showing that the ocean differentials on such traffic also differed (R. 1904).

The very clear reports of the Commission filed in numerous cases decided from time to time over a long period of years demonstrate beyond dispute that the Commission's repeated approvals of the North Atlantic Ports Adjustment were not based on any policy of offsetting ocean differentials. It is true that Mr. Fink, in his report in 1880, and the Cooley commission in the 1882 arbitration, gave much emphasis to the fact that existing ocean differentials then appeared to give an advantage to New York and Boston over Baltimore and Philadelphia.* But as the Commission pointed out in *In the Matter of Differential Freight Rates to and from North Atlantic Ports*, 11 I.C.C. 13 (1905), at p. 18:

> "* * * a careful reading of these reports apparently shows that in the opinion of their authors difference in ocean rates was not the only factor which should be considered, partly for the reason that it was impossible

* The Fink report is printed in full in *Daish, The Atlantic Port Differentials* (1918), at pp. 9-63. The report of the Cooley commission is printed in full at R. pp. 1027-1067.

to determine exactly what the ocean rate was, and partly because the thing to be equalized was not the rate but the advantages of transportation through the several ports."

On the very first occasion that the Commission was called upon to consider the lawfulness of the North Atlantic Ports Adjustment, it found that there was no appreciable difference in the ocean rates from the three ports, New York, Baltimore and Philadelphia on full cargoes of grain, *New York Produce Exchange v. B. & O. R.R., et al.*, 7 I.C.C. 612, 626 (1898).* In 1905 the Commission expressed the flat opinion that the ocean differentials were then and had always been substantially less than the inland differentials, *In the Matter of Differential Freight Rates to and from North Atlantic Ports*, 11 I.C.C. 13, 67.* Again, in 1925, the Commission observed that there then appeared to be no significant difference whatever between the ocean rates to the ports of Boston, New York, Philadelphia and Baltimore, *Maritime Association, Boston Chamber of Commerce v. Ann Arbor Railroad Company*, 95 I.C.C. 539, 554.* On all of these occasions the Commission refused to disturb the North Atlantic Ports Adjustment. It is, therefore, apparent that the Commission's approval of the North Atlantic Ports Adjustment has never been based on any supposed principle of equalizing inland and ocean differentials.

The District Court was equally wrong in asserting that "distance plays no part in the determination of port differentials" (R. 4003). While it is true that the North Atlantic ports adjustment gives only partial recognition to the distance factor, the Commission, in upholding that adjustment over the past 65 years, has consistently held

* Appendix A *infra*, pp. 80-82, 82-84, 88-94, contains pertinent extracts from the reports of the Commission in these cases.

(a) that the ports of Baltimore and Philadelphia are entitled to some rate advantage over the northern tier ports because of their greater proximity to differential territory, and (b) that because of its geographical location, Boston cannot properly be granted a differential over New York. *Chamber of Commerce of N.Y. v. N.Y.C. & H.R. R.R. Co.*, 24 I.C.C. 55, 674 (1912), 27 I.C.C. 238 (1913); *In the Matter of Import Rates*, 24 I.C.C. 78, 678 (1912), 27 I.C.C. 245 (1913); *Maritime Association, Boston Chamber of Commerce v. Ann Arbor Railroad Company*, 95 I.C.C. 539 (1925).*

The fact is, as a reading of Appendix A will make clear, that the Commission's attitude toward the North Atlantic Ports Adjustment has been entirely consistent since it first was called upon to examine it in 1898. Every argument made in the present case on behalf of the northern tier ports had already been repeatedly considered and rejected by the Commission before the present proceedings were begun. When in the present case, therefore, the Commission stated that "the present differentials have long served to retain a reasonable competitive relationship between the principal port groups and should be maintained," it was doing only what was to be expected in the light of its previous rulings.

B. The Tonnage Argument

After a careful study of the voluminous evidence in the record bearing upon the flow of traffic through the North Atlantic ports and over the lines of the rail carriers which serve them during the period that the North Atlantic Ports Adjustment has been in effect, the Commission concluded that nothing in these data supported the view that the

* Pertinent extracts from the opinions in these cases will be found in App. A *infra*, pp. 84-87, 88-94.

differential rates at issue in this proceeding were unfair or discriminatory against the northern tier ports or the rail carriers which serve them (R. 3806). The District Court rejected this finding and adopted the northern carriers' view of the true import of certain tonnage statistics which they cited in their brief. On the basis of these statistics, the District Court concluded, contrary to the express finding of the Commission, that in recent years the North Atlantic Ports Adjustment has operated in such a manner as to discriminate against the northern tier ports and their carriers (R. 3999-4000).

Aside from the fact that the District Court was obviously invading the province of the Commission in making its own findings on this point, it is submitted that the Commission's findings are fully supported by the record. The Commission did not suggest that the present differential rate structure has had no effect on the flow of traffic through the ports. Indeed, it found quite definitely that it is only because of the differential that the southern tier ports have been able to compete successfully with the northern tier ports for any part of this traffic. The Commission did, however, find the following facts:

First, in spite of the differential, New York has become the world's greatest port, with a near monopoly of the general cargo traffic which moves through the North Atlantic ports.

Second, in spite of the differential, the rail carriers which serve New York have handled the greater part of the general cargo which moves by rail between the North Atlantic ports and differential territory.

Third, general cargo is high-value, high-rated traffic which produces far greater benefits for the ports which handle it.

Fourth, the southern carriers have invested heavily in facilities for handling coal, grains, fertilizer and iron ore, and because of these facilities and their proximity to the sources of coal and grain and to the users of fertilizers and iron ore, they have always, from the very beginning, handled a very large share of the movement of these bulk commodities. Much of this bulk movement is now threatened with diversion to the Saint Lawrence Seaway and the Gulf ports.

Fifth, the greater part of the bulk movement through the North Atlantic ports is not affected by the rates at issue in this proceeding. Neither coal nor petroleum move under these rates and the application of the differential to iron ore is the subject of a separate litigation and is not involved in this proceeding. The influence of the differential on the movement of grain is subordinate to other factors which are controlling. The movement of other bulk commodities, while vital to the southern tier ports and to the southern carriers, *represents approximately one-half of one percent of the total export-import business handled by the port of New York alone.*

Sixth, the failure of Boston, Portland and Albany to attract a large share of the export-import traffic moving through the North Atlantic ports is not primarily due to the differential rates here in issue. Even with substantially lower rates, Albany and Portland have been unable to compete successfully with New York. Similarly Boston cannot compete successfully with New York for traffic in its own hinterland although its rates in that area are lower than those at New York.

Seventh, "the greater distances of the northern tier ports from the affected territories, and the higher costs of service to and from those ports are firmly established."

Eighth, facilities and services at the port of New York are far more extensive than at the southern tier ports.

Ninth, the southern tier ports are much more dependent on traffic moving to and from differential territory and have far less support in the hinterlands which they serve than the northern tier ports.

Tenth, many large shippers to and from differential territory prefer to use the port of New York and would concentrate their business there if the differentials provided by the North Atlantic Ports Adjustment were eliminated.

In view of the cardinal importance of these findings we feel bound to call the attention of the Court to the evidence and the subsidiary findings on which they were based and the next sixteen pages of this brief will be devoted to that purpose.

C. The Flow of Traffic Through The Ports

The record in this case contains voluminous data as to the export-import traffic moving through the North Atlantic ports over a long period of years. In addition, traffic studies were presented showing the movements by commodity classes through the several ports to and from differential territory during a twelve-month test period ended July 31, 1956. The Commission found that

> "These data are the best evidence which the record affords of the combined relative impact of the present differentials and other circumstances upon the movement of the subject traffic through the several ports" (R. 3765).

The Commission has summarized this data in a series of appendices attached to the original report. In comparing these tables to the figures found in the District Court's opinion, this Court should bear in mind (as the District Court did not) that the rates at issue have no application to the movement of certain commodities. For example,

nearly 21 million tons of New York's total imports are shipments of petroleum, little or none of which moves to differential territory (R. 3754). In like manner, more than 29 million tons of the export traffic through Hampton Roads come from coal mines which are not within differential territory (R. 3755, 3759). This coal traffic, as well as the movement of 16.8 millions tons of iron ore is eliminated for the additional reason that those commodities are expressly excepted from the ambit of the proposed rates (R. 3739). The rates on iron ore are the subject of separate litigation (App. A *infra*, p. 99).

The report of the Commission breaks down the tonnage figures in each category into two classifications — general cargo and bulk cargo. General cargo consists principally of manufactured and semi-manufactured goods, its handling requires the performance of many services, and it produces far more employment and revenue per ton for the community through which it moves than bulk cargo movements (R. 3753-3754, 3838).* Moreover, general cargo is high-rated traffic which yields more revenues to the railroad than does a corresponding bulk tonnage (R. 3791-3792).

(1) *The Total Movement of Waterborne Foreign Commerce.*

The statistical tables attached to the Commission's original report show that the amount of traffic moving through the port of New York has grown continuously throughout the period during which statistical data are available.**

* Thus, the direct port revenue of Baltimore in 1955 varied from an average of $12.46 per ton for general cargo (excluding raw sugar) to $1.99 on some items of bulk traffic, the highest per ton revenue for any bulk item being $4.46. (Hamill, R. 2826).

** Thus, Appendix D to the Commission's original report, shows that in 1923 New York handled oceanborne exports and imports

The Commission found that during 1955 (the last year for which complete statistics were available) the port of New York alone

> "* * * handled more tonnage of all commodities than any one of the southern tier ports; excluding petroleum, coal, and iron ore, it handled nearly as much as those ports combined; and it handled about 60 percent more general cargo exports and imports than those ports combined" (R. 3760).

Tonnage statistics by no means tell the whole story. Of even greater importance is the dollar value of the cargo. Appendix A to the Commission's original report shows that the total dollar value of the cargo handled by New York has likewise steadily increased over the years, reaching the astonishing total in 1955 of $8,298,000,000 (R. 3815). The Commission found that throughout the period for which statistics are available, the dollar value of the cargo handled by New York has been far greater than that of the southern tier ports combined (R. 3771). In 1955 the total dollar value of New York's export-import traffic was approximately ten times that of Baltimore, this being practically the same ratio as prevailed from 1887 to 1899 (R. 3771-3772, 3815).

It is thus apparent that New York has flourished under the differential and that the Port of New York Authority is fully warranted in calling it the "world's greatest port" (R. 2514). The other northern tier ports, faced with the overwhelming competition of New York, have been able to draw only a much smaller part of the traffic which has moved through the North Atlantic ports (R. 3817, Appendix C). This is in spite of the fact that, as we have seen (*supra*, p. 3), Boston has the same rates as New

totaling 22.7 millions of gross tons, in 1946 25.6 millions, in 1951 32.5 millions, in 1955 35.7 millions and in 1956 36.2 millions (R. 3818).

York, Albany has the same rates as Philadelphia, and Portland the same rates as Baltimore on import traffic moving via Canadian routes.

(2) *The Movement of General Cargo*

As early as 1898, the Commission noted that "these high-grade exports go almost entirely to the port of New York."* Again, in 1912, the Commission found that "the great bulk of the high-class tonnage moves through the port of New York and that moving through the other ports is largely the heavier low-grade commodities."**

As to the movement by rail to and from differential territory, an analysis of the material collected in Appendix F to the Commission's original report shows that as to export traffic, subtracting grain, the northern tier ports and their carriers handled 2,192,452 tons of export traffic as compared to 1,303,247 tons handled by the southern tier ports and their carriers (R. 3820). In fact, Appendix F shows that New York alone handled 62.7% of the entire general cargo moving by rail from the affected territory to all of the North Atlantic ports (both the northern and southern tier ports combined) for export.

As to import tonnages, excluding bulk ores the northern tier ports and their carriers handled 646,484 tons and the southern tier ports 576,340 tons. New York alone importing 615,820 tons as compared with Baltimore's 294,898 tons and Hampton Roads' (the next largest) 156,173 tons (R. 3820).

* *New York Produce Exchange v. B. & O. R.R., et al.*, 7 I.C.C. 612 at p. 678.

** *Chamber of Commerce of N.Y. v. N.Y.C. & H.R. R.R. Co.*, 24 I.C.C. 55 at p. 71.

The Commission found that:

> "* * * over 50 export commodities and about the same number of import articles moved exclusively through New York; that over 90 percent of the following exports moved through that port: Flour, ammunition, fresh meats, automobiles and trucks, soybean oil, agricultural implements, glassware, paint, and forwarder traffic. From 70 to 100 percent of the following imports, representing the more substantial tonnage volumes, also moved through New York: Copper, coffee, waste materials, metals and alloys, crude rubber, agricultural products, and lead and zinc. The volume of each of the commodities named exceeded 10,000 tons" (R. 3799).

These findings were based on traffic studies which showed movements by rail through New York and the southern tier ports. Those traffic studies show that the total tonnage of items, 75% to 100% of which were shipped through New York, amounted during the test period to 1,506,861 tons — more than the entire general cargo tonnage moved to and from the affected territory via the Baltimore carriers.*

The Commission expressly found that a number of manufacturers at points in Maryland in or near Baltimore make a substantial portion of their export shipments through New York, in some respects as high as 95%, at rates as much as 79¢ higher than to Baltimore (R. 3801). In like manner 5,370 carloads originated by the Chesapeake & Ohio in differential territory during the year ended June 30, 1957, and exported either through Hampton Roads or

* See R. 2535-2545. See also Appendix F, R. 3820. The extent to which New York is able to attract cargo is graphically illustrated by the fact that 100% of all cigarette shipments move through that port, even though that commodity moves right past the ports of Hampton Roads, Baltimore and Philadelphia in order to get to New York, and even though the extra transportation charge involved in getting the cigarettes to New York is as much as 60¢ per 100 pounds (R. 2574).

New York, 4,650 carloads were exported through New York. As the Commission aptly stated:

> "Thus, notwithstanding its 3-cent advantage this carrier was able to hold only one out of five carloads which it originated" (R. 3802).

On the basis of these and other findings, the Commission reached the following conclusion:

> "The complete dominance by New York of the North Atlantic general-cargo traffic to and from the affected territory is clear. Of imports, its volume exceeded that of all the other ports combined, was more than double that of Baltimore, and almost four times that of Hampton Roads. As to general-cargo exports, New York's volume was 62.7 percent of the total volume for all of the ports and over 50 percent greater than that of the southern tier ports combined. Also, it was more than double the Baltimore volume and more than 10 times that of Hampton Roads" (R. 3767).

The other northern tier ports do not share in this general cargo traffic to any great extent due to their geographical location and the competition of the port of New York (R. 3845). Thus, the Commission found that even with the advantage of Baltimore rates on imports moving via Canadian routes, Portland had attracted virtually no general cargo (R. 3786-3787).* Similarly, the Commission found that Albany has been unable to attract any substantial amount of general cargo although it has the benefit of Philadelphia rates (R. 3788, 3848). The fact is that unless a substantial premium is paid, vessels will not move past New York harbor 143 miles up the Hudson River to Albany.** Boston, with a rate advantage over New York, does not even handle the general cargo which originates in its own hinter-

* See also Appendix F, R. 3820.

** See testimony of Springrose, R. 2304.

land and must stand helplessly by and watch the manufacturers of New England move their traffic through the port of New York (R. 3784, 3845). This predicament of the ports north of New York is nothing new. It has been the subject of consideration by the Commission on more than one occasion, but the Commission has found no lawful way to remedy it.*

Notwithstanding the disabilities of individual ports it is clear from what has been said, that the northern tier ports as a group have an overwhelming advantage over the southern tier ports in their near-monopoly of the general cargo traffic and that the carriers which serve them are consequently in an advantageous position. In the District Court, the northern carriers contended that general cargo is now being moved primarily by motor truck and that for this reason the rail carriers no longer benefit from this predominance of the northern tier ports to the degree that they did in past years. The record does not support this contention. As previously noted, the traffic studies summarized in Appendix F to the Commission's original report show a very substantial movement by rail of general cargo between the northern tier ports and differential territory in the test year 1955-1956 (*supra*, pp. 28-29). These studies, however, do not contain any information as to the movement of traffic by rail from the northern tier ports to points other than those lying in differential territory.**

* See *Chamber of Commerce of N.Y. v. N.Y.C. & H.R.R.R. Co.*, et al., 24 I.C.C. 55 (1912); *Maritime Association, Boston Chamber of Commerce v. Ann Arbor Railroad Company*, 95 I.C.C. 539 (1925). Quotations from these decisions will be found in Appendix A, infra at pp. 84-87, 88-94.

** At the hearing before the Commission the northern carriers flatly refused to produce this information although they admitted that it had been compiled and was readily available (R. 354-357, 1251-1253).

Nor do they contain any data from which a trend adverse to the northern tier ports can be discerned as to the movement by rail between those ports and differential territory. The very scanty data on this point is summarized in the original report of the Commission (R. 3762). It reveals that the New York carriers handled more export-import tonnage in the test year 1955-1956 than in the years 1946-1947. It also reveals that the export traffic handled by the New York carriers in the test year exceeded the total of such traffic handled in 1951 when the Korean War was at its height.

Accordingly, so far as the present record goes, there is nothing to show that the situation of the northern carriers with respect to the movement of general cargo is different from what it has been throughout the period that the differential has been in effect.

(3) *The Movement of Bulk Cargo*

Until 1943 the northern tier ports, and particularly New York, handled a heavy movement of export grain. Throughout this period New York in spite of the differential led Baltimore (at that time the leading southern tier port in the handling of grain) by a wide margin (R. 3769). The Commission found that New York's supremacy in this export grain was primarily attributable to the fact that commercial shippers preferred to move their grain in parcel lots in liners affording direct service to foreign ports—a service which was and is available primarily at New York. The Commission also pointed out that New York had made no effort to handle the grain which moved in full cargoes and had permitted its elevator and storage capacity to dwindle (R. 3769). On the other hand, the southern tier ports had invested large sums in the development of modern elevators and adequate storage space, so that when, after 1943, the government began exporting grain in large quan-

tities, the southern tier ports were prepared to handle this movement, while New York was not (R. 3768-3769). It is quite apparent that in the Commission's opinion, it was this failure of New York to maintain its facilities rather than the differential which accounted for the sharp decline in the tonnages handled by that port between 1943 and 1952.

Since 1952, as the Commission found, changes have taken place in the grain movement which have had a far greater effect than the differential on the movement of export grain. The first development was the increasing importance of commercial operation and the relative decline in importance of governmental activities (R. 3769). The other development was the leasing of elevators to private shippers at Boston and Norfolk (R. 3769). As a result, the Commission found that New York's share in the grain traffic had doubled between 1952 and 1956, that of Boston had nearly trebled, and that of Norfolk had more than trebled (R. 3770). More significant than either of these developments has been the diversion of grain to the St. Lawrence Seaway and the Gulf ports.* Thus, it is evident that factors other than the differential are primarily responsible for the fluctuations in the movement of export grain since 1943 through the several North Atlantic ports, and in its report on reconsideration the Commission expressly so found (R. 3844, 3850).

The Commission noted that in addition to the loss of part of their export grain, the northern tier ports had also

* When this record closed the Seaway had not yet opened but the Commission noted the possibility that it might attract a substantial part of the bulk cargo tonnage previously moving through the southern tier ports (R. 3801). The spectacular growth of movement through the Gulf ports is indicated by Appendix B to the Commission's original report (R. 3732).

suffered from their failure to participate in the movement of coal, petroleum and ores, particularly iron ore, which had "burgeoned" since World War II (R. 3758). So far as coal is concerned, it is not the differential but geography which prevents this participation; because of the physical location of the mines there is practically no movement of coal to or from differential territory, and the Commission expressly so found (R. 3760). Moreover the rates at issue in this case do not apply to the movement of coal (R. 3739). Thus, the failure of the northern tier ports to participate in this movement cannot possibly be attributed to the differential rates at issue in this proceeding. Similarly, as the Commission found, petroleum does not move to or from differential territory (R 3754). So far as iron ore is concerned, rates on this commodity, as has previously been noted, are the subject of separate proceedings (App. A, *infra*, p. 99) and are not included in the rates in issue in the present case (R. 3739).

Thus, the only bulk movement other than grain which is in any way affected by the differentials which the northern tier ports are here seeking to abolish is the movement of chrome, manganese and fertilizers. Appendix F shows the extent of this movement for the test year 1955-56, during which the southern tier ports handled 1,545,482 tons (R. 3820). (This may be compared with New York's total of 38.9 millions net tons of waterborne foreign commerce in 1955 and with the movement by rail between differential territory and New York of 3,038,837 tons.) The Commission found that Baltimore had made special efforts to attract this low-grade traffic by the erection of modern facilities. In striking contrast, none of the northern tier ports has adequate facilities for handling this traffic (R. 3771). Here again the Commission in its report on reconsideration expressly found that:

> * * * the movement to and from the ports of the bulk cargo commodities, chiefly grain and bulk ores other than iron ore, is affected by numerous factors other than the differentials" (R. 3850).

With respect to these bulk movements, the situation of each northern tier port differs from that of the other. As previously noted, New York has made no particular effort to handle this traffic. Notwithstanding this fact, Appendix D of the Commission's original opinion shows that there has been a very substantial movement of bulk commodities through that port.* In sharp contrast, Portland has been unable to attract any substantial amount of export-import traffic except for wood pulp and china clay (R. 3787). So far as imports are concerned, this certainly cannot be attributed to the differential rates which are at issue in the present case, since Portland has the benefit of Baltimore rates to differential territory over Canadian routes. As to exports, it is significant that even when Commodity Credit Corporation agreed to absorb the differentials thereby equalizing rates on the movement of export grain through all North Atlantic ports, no grain moved through Portland (R. 3787). The Commission noted testimony offered on behalf of that port to the effect that equalization would not benefit Portland but would merely cause the loss of the small amount of import traffic which now moves through that port (R. 3787, 3853).

The record shows that Albany has been able to attract substantial movements of grain, although its rates are on the level of Philadelphia and somewhat higher than the rates to Baltimore and Hampton Roads. This would seem to show that Albany's failure to attract other bulk move-

* R. 3818. In 1956 the oceanborne exports other than general cargo amounted to 2.3 millions of gross tons, and the oceanborne imports other than general cargo amounted to 21 million gross tons.

ments is attributable to causes other than the differential, and the Commission so found (R. 3848).

On behalf of Boston it was strenuously contended that the differential precluded it from sharing in the movement of bulk products. The fact, however, is that Boston has always had a large grain movement (R. 3784), and the Commission expressly found that factors other than the differential, particularly abnormally high port costs and the lack of "superior steamship and port services" were the "chief if not the only" cause for Boston's failure to attract export-import traffic (R. 3785, 3851).

From what has been said, it is apparent that the Commission was satisfied that the failure of the ports north of New York to attract export-import traffic is not primarily due to the North Atlantic Ports Adjustment. This is not to say, however, that the preservation of the differentials embodied in that adjustment is not essential to the southern tier ports and the carriers which serve them. On the contrary, the record shows and the Commission found that without the partial recognition which the existing rate structure gives to the only competitive advantage which the southern tier ports possess, they would be in far worse case than the ports north of New York now are (see *infra*, pp. 39-41). In short, while a parity rate structure would be of little or no benefit to the ports north of New York, it would be disastrous to the southern tier ports in their attempt to compete with New York.

D. Transportation and Competitive Conditions Fully Justify the Existing Rate Relationships.

In *Baltimore Chamber of Commerce v. Ann Arbor R.R. Company, et al.*, 159 I.C.C. 691 (1929), Commissioner Eastman observed (at p. 704) that "the existing differentials, Baltimore under New York, are fully justified by

differences in the rail service alone to and from these ports." While this remark appears in the course of a dissenting opinion, this statement was not questioned by the majority of the Commission. It is reiterated in the original report in the present case, where the Commission expressly found:

> "The greater distance of the northern tier ports from the affected territories, and the higher costs of service to and from those ports, are firmly established." (R. 3805-3806)

Again in the report on reconsideration the Commission found that the "geographical, transportation, and cost advantages" of the southern carriers were "fully substantiated of record" (R. 3854).

A glance at any map will show that the ports of Baltimore and Philadelphia are much nearer to key points in differential territory than any of the northern tier ports. On this point the Commission found:

> "* * * the distance disadvantages of Boston * * * are 223 miles over Baltimore, 171 miles over Philadelphia, and 117 miles over New York; and the latter port is 106 miles more distant than Baltimore" (R. 3854).

As to the cost advantages of the southern carriers the record is equally clear. Approximately one-half of this immense record is devoted to cost testimony introduced at the hearing before the Commission by the respective carriers. To attempt to summarize it here would extend this brief inordinately and since it will be discussed in the brief of the appellant railroads, we content ourselves with pointing out that the cost advantage of the southern carriers was conceded even by dissenting Commissioner WEBB, who referred to "their [the northern carriers] cost

and distance disadvantages to the contrary notwithstanding" (R. 3810).

So far as competitive conditions are concerned the advantage is all with the northern tier ports. In its original report the Commission found:

> "The present differentials are smaller than they would be if allowed to be set by competitive factors * * * The comprehensive showing in that [the traffic] study strongly refutes the claim of the respondents and their supporting port interests that such equalization is required to enable them to meet the competition of the southern tier ports and to effect a reasonable and non-preferential rate relationship as between the opposing port groups" (R. 3805, 3806).

Again, in the report on reconsideration, the Commission found:

> * * * the evidence is persuasive that so far as New York is concerned, rate equalization is not required to enable that port to meet the competition of the southern tier ports * * *" (R. 3854).

These conclusions of the Commission were based in large part on the evidence of the flow of traffic under the differentials which we have previously reviewed (*supra*, pp. 25-36). There was, however, other relevant evidence in the record, duly noted by the Commission, which also supported the conclusions which it reached.

Thus, we find that the facilities and services at the Port of New York are far more extensive than at the southern tier ports. The navigable water-front of the Port of New York consists of 650 miles and contain piers capable of berthing over 400 ships at one time (R. 1805). These facilities are readily accessible to ocean vessels, the distance to the open sea being 9 miles as compared with 150 miles in

the case of Baltimore and 107 miles in the case of Philadelphia (R. 1973, 2523).

"An average of one ship every twenty minutes, around the clock, enters or leaves the New York-New Jersey Port" (Gilman Ex. 15, sub-ex. C, p. 10, R. 1821).

General James H. Stratton testified that the advantages of New York over its competitor ports are today "overwhelming"; they are, in fact "almost stunning" (R. 407). On this point, the Commission found:

> "The record is convincing that New York has a preponderance of excellent steamship services as compared with the southern tier ports; and that its general-cargo services far surpass those at such ports, and afford much more frequent sailings and service to and from a far wider range of trading areas" (R. 3707).
>
> "The cost to the shipper occasioned by the delay which occurs between loading at Baltimore and departure at New York (or arrival at New York and unloading at Baltimore) is frequently greater than the differential" (R. 3708).
>
> "New York, in addition to its preponderance of steamship services, has a wealth of supplementary port services * * *. They include international freight forwarders, customhouse brokers, international banking facilities, steamship line representation, consular services, combination export managers, foreign trade zones, commodity exchanges, shipbrokers, marine insurance, foreign government purchasing agencies, and foreign chambers of commerce. * * * the record is replete with details showing New York's superiority as to each type of service organization * * *" (R. 3709).

In addition to its overwhelming advantages of facilities and services, New York has an immensely rich hinterland which is far more productive than that of either Baltimore or Hampton Roads. On this point the Commission found:

"* * * Thus it is apparent that the southern tier ports, especially Baltimore and Hampton Roads, are much more dependent upon such traffic and have far less support in the hinterlands which they serve than the northern tier ports served by the respondents" (R. 3798-3799).*

Because of these overwhelming advantages of New York, the southern tier ports and the carriers which serve them must rely primarily upon the differential in order to be able to compete with the northern tier ports and their carriers for any substantial part of the export-import traffic now moving between differential territory and the North Atlantic ports. There is ample testimony in the record noted by the Commission in its original report (R. 3799-3803) showing that under rate parity the southern tier ports would lose whatever general cargo they now handle to and from differential territory and that this would be followed by the loss of a great part of their bulk cargo as well. On this point the Commission expressly found:

"The principal, and in some instances the only, reason given by one of the respondents' traffic officers, and by the shippers and receivers in the affected territory who testified in support of equalization, for routing traffic through the southern tier ports rather than the port of New York, is the lower freight rates which the differentials provide" (R. 3799).

"As bulk commodities, because of their low value, are peculiarly sensitive to transportation cost, the differential has greater influence on their movement than on general cargo. This movement is generally in regularly scheduled vessels, at equalized ocean rates; and

* There is uncontradicted testimony that the value added by manufactures in New York's hinterland was greater than that of the combined hinterlands of Philadelphia, Baltimore and Hampton Roads. Childe (R. 2932). See also Hamill (R. 282).

in shipper-owned vessels. The variety of general cargo concentrated in New York has drawn such vessels to port. With further concentration of such cargo resulting from rate parity, the steamship lines desiring diversified cargoes would use their influence to attract more bulk cargo to provide balanced ladings at that port, with resulting diversion of bulk cargo on which Baltimore is heavily dependent." (R. 3800).

"Shipper evidence presented by the protestants shows a decided preference for the port of New York" (R. 3801).

"The great variety and volume of the subject traffic which flows through New York under the circumstances disclosed of record emphasizes the strong attractions which induce shippers to use this port. Numerous commodities move entirely or preponderantly through the port, shippers preferring it not only to Boston and Portland, which have the same rates, but to Albany and the southern tier ports, which have lower rates" (R. 3850).

In its original report the Commission concluded:

"* * * that to obtain a volume of traffic which will support a much lower level of port activity and range of shipping services than New York, the southern tier ports have been depending heavily on bulk-cargo tonnage; and that, considering the volume and character of the traffic disclosed by the traffic study, and other evidence of circumstances which induce or deter the flow of the subject traffic, undue diversion from those ports to New York, at least of most types of that traffic, would result from the proposed equalization" (R. 3806).

This finding was reiterated in the Commission's report on reconsideration (R. 3854-3855).

II.

The Commission Was Justified In Cancelling The Rates Proposed By The Appellee Carriers.

A. Approval of the Proposed Rates Would Result in a Pointless Dissipation of Carrier Revenues Which the Act Gives the Commission Full Power to Prevent.

In the preceding portions of this argument we have, we believe, demonstrated that the record in this case furnishes no basis for holding that the differential relationship established by the North Atlantic Ports Adjustment is now unlawful.

In the District Court the appellees did not directly challenge this. Instead they sought to avoid it by pointing out that the present case is the first in which the Commission has been called upon to deal with a voluntary departure by any carrier from the North Atlantic Ports Adjustment. This, they say, alters the case entirely and brings into play the recognized principle that carriers in their managerial discretion may lower their rates within the zone of reasonableness in order to compete for traffic. In this connection they cite such cases as *Texas & Pac. Ry. Co. v. United States*, 289 U.S. 627; *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499; and *New York Central R. Co. v. United States*, 99 F. Supp. 394 (D. Mass. 1951), affirmed 342 U.S. 890.

The argument does not wash. If the existing port relationship is lawful, then the principle invoked by the appellees would even more strongly justify the reductions proposed by the southern carriers. They, too, in their managerial discretion are entitled to lower their rates within the zone of reasonableness in order to compete for traffic. *Lake Cargo Coal*, 139 I.C.C. 367, 391 (1928). Furthermore, where, as here, it is clear that their costs are lower

than their competitors, they are bound in the end to be the victors in any retaliatory lowering of rates, since their opponents rates will sooner reach the non-compensatory level.

So also, the argument that the northern tier ports are entitled to reduce their rates in order to compete with the St. Lawrence Seaway misses the point completely, since the southern tier ports are likewise faced with Seaway competition. Indeed in their case, the results of that competition are far more serious, as they have been handling bulk traffic primarily, and it is bulk traffic which is most likely to be diverted from the Atlantic ports to the Seaway (*supra*, pp. 33, 39-40). We may assume that a parallel reduction of rates on export-import traffic by all the carriers serving the North Atlantic ports could easily be justified in order to meet Seaway competition, but no attempt was made to do so in the present case. As the appellees themselves pointed out to the Commission, this case involves a proposal to alter existing rate relationships rather than a proposal to lower the level of existing rates.*

The case thus comes down to this:

(1) The Commission was faced with a rate war which could be stopped either by ordering cancellation of all the proposed rates (which would have the effect of maintain-

* As the Commission pointed out in its original report in the present proceeding, the northern railroads in their reply to the petition of the southern railroads for an investigation into the cost of rail transportation of all export-import traffic to and from the port of New York urged that the reduced rates proposed by the northern railroads "raised only a question of rate relationships between the North Atlantic ports and required no investigation of the level of those rates" (R. 3752). The petition of the southern railroads and the reply of the northern railroads are printed in full at R. 41-45, 52-58.

ing the existing rate structure), or by canceling only the matching reductions proposed by the southern carriers (which would impose parity), or by prescribing a wholly different rate relationship. This latter course was not urged by either side, although in this connection it is significant to note that the Commission expressly found that the present differentials are smaller than they would be if allowed to be set by competitive factors, and also much smaller relatively than when originally established. (R. 3805.)

(2) The Commission found that the existing rate relationship is fair and that if the rate reductions proposed by the northern carriers are permitted to become effective the matching reductions proposed by the southern carriers should likewise be permitted to go into effect.

(3) No attempt has been made by any party to the case to justify a parallel reduction in rates by both the northern and southern carriers. The northern carriers' justification is for a parity relationship and the southern carriers' justification is for the existing differential rate structure.

(4) The southern carriers have lower costs, and since their rates would continue to be compensatory after those of the northern carriers would reach the non-compensatory level, the southern carriers have the power to maintain the existing differential rate structure if not prevented from doing so by the Commission.

Under such circumstances the Commission had to choose between intervening to stop the rate war by prescribing a relationship or permitting the carriers to fight it out, in which case the lower costs of the carriers seeking to maintain the differential would insure their ultimate victory. To avoid a futile dissipation of carrier revenues, the Commission chose to prescribe the relationship which a

rate war would ultimately have achieved and which the Commission, after weighing all the relevant factors, found to be fair.

The Commission in its original report in the present case rested its conclusion on this precise ground, saying:

> "As hereinbefore mentioned, protestant railroads have filed a counter-proposal, in the event that the respondents' rates are found lawful; they propose to reduce their rates between southern tier ports and the same interior territory by the same amounts as proposed by the respondents. The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports, are firmly established. Thus, approval of respondents' proposed rates would require alternate approval of protestants' proposed rates. This might result in the rates gravitating to their lowest possible level and in a needless dissipation of carrier revenues. We have been given the power to fix rates, among other reasons, for the purpose of preventing destructive competition and promoting the financial stability of the regulated carriers. Failure to observe our obligations in the exercise of that power would find us remiss in our duties" (R. 3805-3806).

Again, in its report on reconsideration the Commission said:

> "While in the instant proceeding there is strong insistence by the respondents and the ports supporting them upon rate parity, equally strong are the claims of their opponents, fully substantiated of record, as to the opponents' geographical, transportation and cost advantages" (R. 3854).

This action of the Commission was firmly grounded in statutory authority. As the District Court conceded (R. 3999), under Section 15(7) of the Act, the burden of proof rested on the appellee carriers to show that the proposed

rates were just and reasonable and otherwise lawful. The failure of the appellee carriers to meet this burden is, we think, perfectly apparent. They have failed to show that the existing differential rate structure is unsound, nor have they advanced any convincing reason why the southern carriers should not be permitted to maintain it. Thus, they have shown no basis upon which the Commission could have justified imposing equalization on the southern carriers and the ports which they serve. Faced with the choice between letting the carriers fight it out or ordering all proposed rates canceled, the Commission chose the only rational course, especially in view of the fact that the distance and costs advantages of the southern carriers made it inevitable that a rate war would end in the maintenance of the differential at a lower level. Rates which can have no effect except to dissipate badly needed carrier revenues are clearly not just and reasonable, and the Commission had full power to require their cancelation.

In *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499, Mr. Justice CARDOZO, speaking for a unanimous Court, said (pp. 509-510):

> "The danger [of a rate war] is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds. If Illinois lines attempt to lower their rates again, a proceeding will be available to maintain a fair relation. If the lines in Kentucky, operating in interstate commerce, apply for new reductions, the supervisory power of the Commission will subject them to the rule of reason. But other remedies even more plainly adequate are at hand in case of need. Under § 15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly. *Florida v. United*

States, 292 U.S. 1; *United States v. Louisiana*, 290 U.S. 70."

This broad interpretation of § 15 is required by the national transportation policy which declares the policy of Congress "to foster sound economic conditions in transportation and among the several carriers" and directs the Commission to administer and enforce all of the provisions of the Act with a view to carrying out that policy (see App. B *infra*, p. 101). In *Iron Ore, Ex-Labrador, Canada, to Youngstown, Ohio*, 302 I.C.C. 109 (1957), the Commission said at p. 117:

> "The proposed reduction from Philadelphia is disapproved for the reason that it would result in a rate war and in needless dissipation of greatly needed carrier revenue and thus constitute an unfair and destructive competitive practice in contravention of the national transportation policy."

In *New York Central Railroad Company v. The United States*, 207 F. Supp. 483 (S.D. N.Y. 1962), Judge FRIENDLY said (at page 497):

> "The Milwaukee case is clear authority that the mere threat of a rate war is not enough to support a minimum rate order if the war be one the Commission ought to prevent. *On the other hand, if the Commission would not think it proper to prohibit a retaliatory reduction, either for lack of power or for lack of good reason, it may properly fix a minimum rate in the first instance in order to ward off developments that would simply result in reinstatement of existing differentials at a lower level.* The Youngstown case [Youngstown Sheet & Tube Co. v. The United States, 295 U.S. 476] was of that sort. The Commission had justifiably found both that the proposed rates were too low on general transportation standards and that they would disrupt a rate structure either fixed by the Commission or previously found by it to be just

and reasonable, 197 I.C.C. 617 (1933), 295 U.S. at 480, 55 S. Ct. 822."

(498) "There would seem to be three possible views about parity in the rates on imported iron ore among the three ports — that it is the only lawful relationship, the view the Commission took when the case was first before it; that it is unlawful; or that although parity is not unlawful; a differentially lower rate for Baltimore and Philadelphia could not properly be held to be. What is needed is that the Commission tell us which of these views it holds and, since it now appears to hold a different view from what it first did, why. Secretary of Agriculture v. United States, supra. Merely saying that a rate war is possible or probable is not a sufficient answer why; *an adequately supported statement that the Commission would not feel able to prevent one would be.*" (Emphasis supplied.)

In the present case we respectfully submit that the reports of the Commission supply an "adequately supported statement" showing that the present differential rate structure is a fair one, and that the Commission would not feel able to prevent the southern tier carriers from lowering their rates so as to maintain it. Under such circumstances the Commission was clearly acting within its powers in ordering cancelation of all the proposed rates.

The District Court completely ignored this aspect of the case; indeed, Judge SWEENEY did not even mention the passages which we have quoted from the reports of the Commission. The appellees also failed to meet this issue in their arguments in the District Court and in their motion to affirm filed in this Court. Their only answer to the argument here advanced is that the Commission should cancel the matching reductions of the southern carriers because they would provoke a rate war. In this connection, they also seek to rely on Mr. Justice CARDOZO's opinion in *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499

This reliance is clearly misplaced. In the *Milwaukee* case a long-standing and complex rate relationship applicable to the movement of coal from mines in Illinois, Indiana and Kentucky to the cities of Rockford and Freeport in the State of Illinois had been disrupted by an order of the Illinois Commerce Commission requiring the reduction of certain intra-state rates. To meet this situation, the Milwaukee proposed to lower rates over its single-line routes from two groups of mines to those cities. The Commission annulled the proposed rates on the ground that they would disrupt the existing rate structure and might lead to a rate war. This Court upheld a judgment of the District Court enjoining enforcement of the Commission's order. Mr. Justice CARDOZO said (at page 509):

> "We are warned by the new report, however, that a change once permitted has a tendency to spread. The acceptance of the new schedule for Milwaukee will lead, it is said, to requests for proportionate reductions by other lines in Indiana, and this in turn to new reductions by lines in Illinois, and even in Kentucky, the outcome being characterized in the argument of counsel, though not in the report, as a rate war between the roads. *The threat of such a war may be a reason for rejecting a new schedule if the rate relation previously existing is a fair one, or even, we may assume, if the Commission is without power to avert the reprisals and thereby nullify the threat.* Neither of these conditions is satisfied in this case. *The Commission does not hold that the existing rate relation is intrinsically sound and fair.* On the contrary, it expressly concedes that the rate situation as between the Illinois and Indiana groups may be in need of correction, though it expresses the belief that this should not be done in any piecemeal fashion." (Emphasis supplied.)

So far from supporting the contentions of the appellees it seems clear to us that this opinion is precisely to the con-

trary effect. In the present case there is no finding by the Commission that the existing rate relationship is unsound. On the contrary, the Commission has found that the "present differentials have long served to retain a reasonable competitive relationship between the principal port groups and should be maintained" (R. 3806). The appellees do not contend that the existing rate differential structure is unlawful. What they argue is simply that since the northern carriers have taken the initiative in filing reduced rates, the southern carriers are now precluded from following suit because that would start a rate war.*

Following the decision in the *Milwaukee* case, the rates proposed by that railroad became effective. Thereupon the Illinois Central filed matching reductions of its single-line rates from mines in the same group to the same cities. Subsequently, other carriers proposed similar rates to Beloit, Wisconsin which would also have been applicable to movements from other groups of mines. These rates were protested and the Commission instituted an investigation under Section 15(7) of the Act. In *Coal to Beloit, Wis. and Northern Illinois*, 263 I.C.C. 179 (1945), the Commission proceeded to prescribe rates which abrogated the very rates which this Court had upheld in the *Milwaukee* case. That order of the Commission came before this Court in *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573 and was upheld. Mr. Justice DOUGLAS, speaking for a unanimous Court, said (pp. 589-590):

"The chief problem of the Commission in this case was to provide a rate structure which would afford

* This perverse reasoning is reminiscent of the famous French couplet:

"Cet animal est très méchant,
Quand on l'attaque, il se défend."

See *Oxford Dictionary of Quotations* (2nd ed. 1953), p. 12.

fair and reasonable relations of rates to northern Illinois destinations, both as between the respective origin groups and as between Indiana groups and Illinois groups. There had been historically no fixed relation either between the former or the latter. And the appearance of a dual basis of rates greatly distorted the picture. The Commission did in this case what the Court pointed out in United States v. Chicago, M. St. P. & P. R. Co., supra (294 U.S. at 510, 79 L. ed. 1031, 55 S. Ct. 462), it had not done there, viz, it adjudged the fairness of the relation subsisting between Illinois and Indiana rates."

B. The Proposed Rates Would Cause Undue Prejudice and Disadvantage To The Southern Tier Ports.

Both in its original report and in its report on reconsideration, the Commission went beyond holding that the differential should be maintained in order to avoid a useless rate war and held that parity was unlawful. This conclusion was based on a finding that the proposed parity rates would cause undue diversion of traffic from the southern tier ports and would cause them undue prejudice and disadvantage in violation of Section 3(1) of the statute.

As this Court first pointed out in *Texas & Pac. Ry. Co. v. I.C.C.*, 162 U.S. 197, at p. 219, the question of undue preference and prejudice is a question "not of law, but of fact." In *Board of Trade v. U. S.*, 314 U.S. 534, this Court said (at p. 546):

> "The Act forbids the Commission to establish a rate structure which would give one transit point an 'undue or unreasonable preference or advantage' and would subject another point to an 'undue or unreasonable prejudice or disadvantage.' But this does not mean that the law compels identity of treatment for like services at different places. It prohibits only 'undue'

> or 'unreasonable' discriminations. Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission. . . .' "

Notwithstanding this well-settled principle, the District Court held that the Commission's conclusion that the rates proposed by the northern carriers would cause undue prejudice to the southern tier ports was erroneous as a matter of law. In support of that holding, a variety of arguments were advanced.

(1) Judge SWEENEY asserted that the "Commission in reaching the conclusion that the proposed rates violate section 3(1) relies on a single subsidiary finding — the distance disadvantages of the northern tier ports" (R. 4003). Again Judge SWEENEY refers to "the weight the Commission attached to the sole subsidiary finding upon which this conclusion is based — that the northern tier ports have a distance disadvantage over Baltimore of from 223 miles in the case of Boston to 117 miles in the case of New York" (R. 3998).

It is difficult to understand how anyone can read the original report of the Commission in this case, with its detailed analysis of the vast amount of data which this record contains, without recognizing that the Commission's general finding of undue prejudice and disadvantage was based on an array of subsidiary findings bearing directly on that issue. We refer the Court to the preceding discussion at pp. 22-41, *supra*, where the principal subsidiary findings have been reviewed. That the Commission relied on these findings in reaching its conclusion as to undue prejudice seems indisputable. Thus the Commission said:

> "* * * the record is clear that New York continues to attract more of the highly desirable general-cargo

tonnage so vital to its port economy than all of the other North Atlantic ports combined; that to obtain a volume of traffic which will support a much lower level of port activity and range of shipping services than New York, the southern tier ports have been depending heavily on bulk cargo tonnage; and that, considering the volume and character of the traffic disclosed by the traffic study, and other evidence of circumstances which induce or deter the flow of the subject traffic, undue diversion from those ports to New York, at least of most types of that traffic, would result from the proposed equalization" (R. 3806).

In its report on reconsideration the Commission made it perfectly clear that it was not abandoning any of the findings in its original report. Thus at the very outset, the Commission said:

> "Only the principal facts recited in the previous report will be repeated herein. The evidence includes a vast amount of statistical data. Much of these relate to tonnage moving through each port and, collectively, through the northern and southern tier ports. The most important of these data are summarized in the appendices to the prior report, to which reference will herein be made" (R. 3837).

Again the Commission said:

> "* * * we reopened these proceedings for consideration of the lawfulness of the proposed rates separately and independently on traffic to and from each of the northern tier ports. Facts and contentions stated in the prior report will be restated only to the extent necessary for a clear understanding of the issues" (R. 3839).
>
> "Upon reconsideration, we find that the proposed rates to and from Albany, New York, Boston and Portland, separately and collectively, are not shown to be reasonably related to the present rates on like traffic to and from the southern tier ports, and would cause

undue preference of and advantage to the named ports and undue prejudice and disadvantage to the southern tier ports. In other respects, the prior findings are affirmed" (R. 3855).

The report on reconsideration itself contains many important subsidiary findings other than those relating to distance on which the Commission based this conclusion (R. 3839-3853).

It is clear, therefore, that the District Court erred in assuming that the Commission's finding of undue prejudice was based solely on distance. Rather it was based on an appraisal of an enormous record which reveals a complex factual situation that only an expert and experienced body such as the Commission is equipped to evaluate. The remarks of Mr. Justice DOUGLAS in *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, are peculiarly apposite. He said (at p. 593):

> "We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. * * *"

(2) As a second reason for reversing the Commission Judge SWEENEY asserted that

> "Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads, see

United States v. Illinois Cent. R.R., 263 U.S. 515, 524 (1924), but the Commission made no such cost or value findings nor does the record contain evidence from which it could make such findings. We must, therefore, rule that its conclusion lacks the required basic findings to support it" (R. 4004).

The original report contains a full review of extensive evidence bearing on the cost and value of the services of the railroads (R. 3791-3798), and the Commission explicitly found that "the greater distance of the northern tier ports from the affected territory, and the higher cost of service to and from those ports, are firmly established" (R. 3805-3806). Again, in the report on reconsideration, the Commission expressly found that the claims of the opponents of rate parity as to their "geographical, transportation and cost advantages" were "fully substantiated of record" (R. 3854).

(3) Judge SWEENEY concluded that the Commission had not given "due weight" to the interests of shippers, receivers, carriers and inland localities. In support of that conclusion Judge SWEENEY said (R. 4002):

> "In 1940, Congress, by adding the National Transportation Policy, 49 U.S.C.A., note preceding section 1 affirmed and reiterated the view that the Act must be interpreted as a whole and the competing interests of shippers, carriers, and localities carefully balanced 'to the end of developing a national transportation system
>
> . . . .
>
> "While apparently recognizing these principles, the Commission, in this case, nonetheless wholly ignored them. It noted the voluminous testimony of shippers and receivers in favor of equalization, but in its conclusions completely disregarded this evidence. It considered the need of the plaintiffs and their competitive disadvantage, but discounted both in its findings. Its final decision rests solely on the proposition that some

ports would be unduly preferred and others unduly prejudiced by the proposed rates."

This language should be read in connection with two other passages in Judge SWEENEY's opinion (R. 4004):

> "Thirdly, the Commission has failed to distinguish between rates which carriers may voluntarily publish to meet competition pursuant to section 15(7) and rates which carriers, on complaint under section 3(1), may be required to change. It is now well established that carriers may, within the zone of reasonableness, adjust rates to meet competition — United States v. Chicago, M., St. P. & P. R. R., 294 U.S. 499, 506, 55 S. Ct. 462, 79 L. Ed. 1023 (1935); Texas & Pac. Ry. v. United States, 289 U.S. 627, 636, 53 S. Ct. 768 (1933); New York Cent. R. R. v. United States, 99 F. Supp. 394 (D.C. Mass. 1951) — in which case the issue to be decided is whether the *proposed* rates are lawful. In a complaint proceeding the question is whether the *existing* rates are lawful and, if not, whether they should be required to be changed. However, both the Report and the Report on Reconsideration give continuous indication that the Commission regarded this as a 'port' case, not a 'railroad' case. For example, the observation that 'in the rare instances where rate changes in port relationships have been required by us, distance has been an important consideration,' p. 21, Recon., while perhaps true, was totally irrelevant to the issues before it. * * *"
>
> "The Commission disapproved the plaintiffs' proposal on the additional ground that, insofar as New York is concerned, equalization is not necessary to enable that port to compete. This conclusion again is based on a misunderstanding of the nature of the proceedings. While the New York Port Authority and other New York governmental and commercial interests were undoubtedly active participants in the case, the primary issue is whether equalization is necessary to enable the plaintiff railroads to compete."

While these passages do not yield readily to interpretation, they seem to be saying that the only issue in this proceeding is whether the northern carriers needed parity rates in order to compete and that if such a need existed, then any prejudicial effect of parity on the southern tier ports would be irrelevant. Such a construction of the statute is, we submit, plainly erroneous.

The statutory authority of the Commission in a proceeding under section 15(7) to order cancellation of proposed rates which it finds would subject any particular port to undue or unreasonable prejudice or disadvantage is perfectly clear. Section 3(1) (49 U.S.C. §3(1)), declares it to be unlawful for any rail carrier "to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Together with section 1(5) which condemns unjust and unreasonable rates and charges and section 2 outlawing special rates and rebates, section 3(1) forms the keystone of federal regulation of transportation and is remedial in scope. *Texas & Pac. Ry. Co. v. I.C.C.*, 162 U.S. 197, 233-234. It differs from the others in that it may be availed of not only by shippers with respect to rates, but any other person or interest specifically named therein *who has been or may be injured* by any proposal by rail carriers "in any respect whatever." *Barringer & Co. v. United States*, 319 U.S. 1. It was aimed at wiping out discriminations of all types and Congress used language of the broadest scope to accomplish all of its purposes. *United States v. Baltimore & O. R. Co.*, 333 U.S. 169. The National Transportation Policy (54 Stat. 899) specifically includes its purposes with-

in the Congressional statement of policy by which the Interstate Commerce Act shall be administered and enforced.

In the original Act (Feb. 4, 1887, c. 104, sec. 13, 24 Stat. 383), and until 1910 the only remedy available to a beneficiary of the prohibitions of section 3(1) and any other remedial section of the Act was by petition to the Commission after rates became effective. Upon full hearing the Commission was authorized to compel cessation of the violation. This remedy is today embodied in section 13(1) (49 U.S.C. §13(1)). However, Congress, by the Mann-Elkins Act of 1910, supplemented this remedy of complaint after alleged damage with the procedure embodied today in section 15(7) (49 U.S.C. 15(7)).

This is the procedure involved here. It is unnecessary at this point to quote the statute at length. It is sufficient only to emphasize that it authorizes the Commission in broad terms to suspend new rates, enter into an investigation of their "lawfulness" (which embraces each remedial section of the statute) and to "*make such order with reference thereto as would be proper in a proceeding initiated after it had become effective*," i.e., as would be proper in a complaint proceeding under section 13(1) (Emphasis supplied). Thus, the statutory scheme is crystal clear.

The cases relied on by Judge SWEENEY do not establish any broad principle that the competitive needs of carriers are paramount and warrant disregard of the effect of proposed rates on ports. It is true that in the *Galveston* case (*Texas & Pac. Ry. Co. v. United States*, 289 U.S. 627), a bare majority of this Court over the dissent of Chief Justice HUGHES and Justices BRANDEIS, CARDOZO, and STONE, set aside an order of the Commission which compelled reluctant carriers to establish a differential recognizing a distance advantage of Galveston and other Texas ports

over New Orleans in the movement of traffic to and from certain interior points. The decision in that case was based on two grounds, both of which have subsequently been repudiated. One ground was that no order could be made under section 3 unless the carrier against which the order was directed controlled the joint rate. In *New York Central Railroad Company v. United States*, 207 F. Supp. 483 (S.D.N.Y. 1962), Judge FRIENDLY pointed out that (p. 490):

> "* * * the combined effect of New York v. United States, 331 U.S. 284, 340-343, 67 S. Ct. 1207, 91 L. Ed. 1492 (1947), and Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 593-594, 69 S. Ct. 278, 93 L. Ed. 243 (1949), is to validate Mr. Justice Stone's statement, dissenting for the Chief Justice, Mr. Justice Brandeis, Mr. Justice Cardozo and himself, in Texas & Pacific, 289 U.S. at 669, 53 S. Ct. 768, that the 'control' requirement exists only when the Commission issues an 'alternative order' requiring the removal of discrimination and not when, as here, it uses the minimum rate power against carriers which are parties to the two rates claimed to be discriminatory."

The principal ground on which the majority rested the decision in the *Galveston* case was that a port was not a "locality" entitled to the protection of section 3(1) of the statute as it then stood. Congress promptly passed the Act of August 12, 1935, c. 509, sec. 1 (49 Stat. 607), specifically including ports among the localities entitled to protection against undue prejudice and disadvantage.

It is true that Mr. Justice ROBERTS' opinion in the *Galveston* case contained some general language indicating that carriers in initiating rates may adjust them to competitive conditions and that such action does not amount to undue discrimination (289 U.S. at p. 636). But as Mr. Justice STONE was careful to point out in his dissent, at p. 656:

> "In holding that the Commission is without power to make the order, the Court does not deny that a discrimination which is produced by charging equal rates for unequal service is prohibited by the statute as much as one resulting from unequal rates for equal service. Compare the Shreveport Case (Houston, E. & W. T. R. Co. v. United States) 234 U.S. 342, 346, 58 L. ed. 1341, 1346, 34 S. Ct. 833. Nor does the Court consider material, in this respect, the findings of the Commission that the rates to Texas ports and New Orleans are both reasonable to shippers, in that the former are not too high, or the latter so low as to cast a burden on other traffic. For it is not denied that the Commission may remove a discrimination effected by rates which are within the zone of reasonableness if the discrimination is one forbidden by §3(1) of the Act."

We respectfully suggest that if any weight whatsoever can be attached to the language of Mr. Justice ROBERTS on which the appellees rely, it must be interpreted in the manner suggested by Mr. Justice STONE and his colleagues.

The District Court also relied upon the *Milwaukee* case (*United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499). Nothing in that case presented any issue under section 3(1) of the statute. The remarks of Mr. Justice CARDOZO at p. 506 to which the District Court refers related to a wholly different question, viz.: whether the rates at issue in that case violated sections 1(5) and 15(a)2 of the statute.

Finally the District Court invoked *New York Central R. Co. v. United States*, 99 F. Supp. 394 (D. Mass. 1951), affirmed by this Court in 342 U.S. 890. That case held that carriers were entitled to publish rates eliminating a differential on the movement of ex-lake grain from Buffalo which had favored Philadelphia and Baltimore over New

York and Boston. Again that case presented no issue under section 3(1) of the statute. This was clearly pointed out by Judge MAGRUDER, who said (at 99 F. Supp. 402):

> "Finally, the Commission did not find that, because of the difference in terminal operations, equalization of rates would unduly prejudice Baltimore and Philadelphia or unduly prefer New York, in violation of section 3(1)."
>
> (p. 404) "Perhaps the use of the word 'unjust' in the sentence quoted would imply that carriers in an effort to meet competition could reduce rates to bring about some diversion, but not too much. In any event, the statement falls short of an express finding that the proposed rate equalization would result in such a drastic diversion of traffic as to work undue prejudice to Baltimore and Philadelphia and thus to violate §3(1), the only section of the statute specifically dealing with the matter of port relationships. Hence, we think it is not a sufficient basic finding to support the Commission's ultimate conclusion.
>
> "Even if the statement is treated as a finding that rate equalization would produce such extensive diversion of traffic as to prejudice unduly the ports of Baltimore and Philadelphia, such finding is not supported by substantial evidence on the record as a whole."

It should also be noted that in the *Ex-Lake Grain* case, no matching reductions had been filed by the southern carriers and that there was virtually no difference in the distance between the affected ports and Buffalo as the Commission itself found (See 99 F. Supp. 398).

In a motion to affirm previously filed in this case, the appellees quote from the report of the House Committee on Interstate and Foreign Commerce some general language to the effect that the 1935 amendment to section 3 of the statute was intended to "afford competing ports

a forum in which to complain of rate adjustments which tend to concentrate the movement of the traffic through one port or a limited number of ports and to deprive other ports of an opportunity to handle a part of such traffic." The appellees argue that this language demonstrates that the amendment of section 3 was intended to eliminate all differential rates from port adjustments. However, as the Commission pointed out (R. 3853):

> "For over 20 years following the above-mentioned amendment to section 3(1) of the act, no North Atlantic port, except Philadelphia, has complained of any unlawfulness in the general adjustment of these port rates."

Moreover, the legislative history of the 1935 amendment proves that the appellees construction of the statute is inadmissible. While that amendment was before the Senate, Senator Long of Louisiana offered an amendment which provided:

> "Where rates and charges of common carriers to ports are made as reductions to equalize rates to ports served by competing carriers, it shall not be termed undue preference or discrimination" (79 Cong. Rec. 10608).

This amendment was rejected by a vote of 49-23 (79 Cong. Rec. 10619). In view of that action, we submit that the 1935 amendment cannot be construed to accomplish what Congress refused to provide. *Cf. United States v. Pfitsch*, 256 U.S. 547, 550-552; *United States v. Great Northern Railway Co.*, 287 U.S. 144, 154-155; *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 305-308.

In *New York v. United States*, 331 U.S. 284, 300, this Court pointed out that the 1935 and 1940 additions to section 3 were not intended to introduce any new standard of discrimination, but merely to make clear that ports, regions,

districts and territories were entitled to protection against undue discrimination.*

Judge SWEENEY took an even more extreme view of the statute than do the appellees, asserting that "one of the purposes of the 1935 amendment of Section 3 was * * * to permit *all* ports and the carriers serving them to compete for *all* import and export traffic and thereby maximizing the number of ports available." (Emphasis supplied.) (R. 4004). Such a construction of the statute would border on absurdity. There is, of course, no principle that all ports and the carriers serving them are entitled to compete on on equal terms for all export and import traffic to every inland point. No one would argue that Baltimore railroads are entitled to compete on equal terms with Philadelphia carriers for the traffic to Wilkes-Barre or Scranton. Nor would anyone contend that the Baltimore railroads are entitled to compete on equal terms with the New York carriers for traffic moving to the Hudson River Valley.

(4) Judge SWEENEY asserted that (R. 4004):

> "The finding in this case, if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port. On the other hand, if applied only in this case, the decision is arbitrary and capricious."

This amounts to saying that if any weight is given to distance in adjusting rates between the North Atlantic ports, then no weight may be given to any other factor in this or

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* See also the remarks of Senator Walsh of Massachusetts (79 Cong. Rec. 10596):

> "There is no change in the yardstick. The same yardstick or the same method of reaching a decision by the Interstate Commerce Commission will exist with the word 'port' in the law that now exists with the words 'person, firm, corporation or locality' in the law. It is simply an extension of the jurisdiction, where discrimination exists, to include 'port' and embrace it within the word locality."

any other port adjustment where a distance difference is found to exist. This kind of reasoning hardly requires an answer. Obviously distance may be given more weight in some cases than in others, the precise weight to be given in any case depending upon other relevant circumstances. It is unreasonable to say that no weight can be given to distance unless it is treated as dispositive.

A somewhat similar argument is that made by Commissioner WEBB, dissenting, who contended that in the present case the Commission has for the first time departed from an established policy of rate equality which "by preventing the growth of monopolies based on geographical advantages, has benefited railroads, shippers, ports, steamship operators, and the general public by insuring a free flow of commerce through as wide a range of ports as practicable" (R. 3807). Adoption of this argument by the District Court is implicit in Judge SWEENEY's statement that "Until it filed its report on reconsideration in this proceeding, the Commission, itself, has continually adhered to the proposition that distance plays no part in the determination of port differentials" (R. 4003).

In an earlier part of this brief we have undertaken to show that this was certainly not true in the case of the North Atlantic Ports Adjustment which from the very beginning has given at least partial recognition to the distance advantages of Baltimore and Philadelphia over New York and Boston (*supra*, pp. 21-22).

Nor is the North Atlantic Ports adjustment the only instance in which the distance factor has been given weight by the Commission. In *Galveston Commercial Association v. Galveston H. & S. A. Ry. Co.*, 100 I.C.C. 110 (1925), 128 I.C.C. 349 (1927), 160 I.C.C. 345 (1929), the Commission compelled reluctant carriers to give recog-

nition to the distance advantage of the Texas ports over the port of New Orleans to certain interior points.* As previously noted, this case was reversed in this Court, but the opinion of Mr. Justice ROBERTS, who spoke for the majority, was based on grounds which have since been repudiated, and the dissenting opinion of Mr. Justice STONE speaking for Chief Justice HUGHES and Justices BRANDEIS and CARDOZO upholding the action of the Commission speaks with far greater authority today.

It is true that in the Commission's original report in the present case there are certain passages which appear to be consistent with Judge SWEENEY's statement that "distance plays no part in the determination of port differentials", but the Commission properly set the matter straight in its report on reconsideration in the present case (See R. 3839-3840, 3847-3848, 3852-3853). It is, also true, of course, that distance considerations may in some cases not be regarded as controlling. In *Hillsborough County Port Authority v. Ahnapee & W. Ry. Co.*, 313 I.C.C. 691 (1961), aff'd. *Alabama, Tennessee and Northern Railroad Company, et al. v. United States, et al.*, 207 F. Supp. 638 (S.D. Ala. 1962) the Commission said (at pp. 695-696):

> "It is sound and reasonable to conclude that between the ports and their surrounding areas the inherent advantage of rail distance should be a factor in influencing the rate that will move the traffic through its natural port. Generally, however, as the distances from competitive ports increase, the significance of the mile-

* See also *Port Commission of the City of Beaumont, Texas, v. Abilene & Southern Railway Company*, 251 I.C.C. 137 (1942), 253 I.C.C. 127 (1942); *Nueces County Navigation District No. 1 v. Abilene & Southern Railway Company*, 251 I.C.C. 115 (1942), 253 I.C.C. 99, 745 (1942); *Tampa Traffic Association, et al. v. Aberdeen & Rockfish Railroad Company*, 272 I.C.C. 217 (1948), 281 I.C.C. 483 (1951), 285 I.C.C. 455 (1952), aff'd. 132 F. Supp. 948 (S.D. Fla. 1955).

age factor decreases in arriving at just and reasonable port rate relationships."

Again, in *City of Wilmington v. Alabama Great Southern Railroad Company, et al.*, I.C.C. (decided June 14, 1962), the Commission said that where a more distant port is faced with the competition of stronger ports, equalization has often been permitted or even required, but such equalization has been confined within reasonable limits determined by the needs of the ports concerned, the carriers serving them and the shipping public.

It is upon this theory that Boston, in spite of its distance disadvantage, has always been held by the Commission to be entitled to the same rates as New York on traffic moving to and from differential territory. It is also consistent with this theory that Hampton Roads has received the benefit of Baltimore rates west of the Sandusky line and Portland has the same rates on imports moving to that territory via Canadian routes. See *Maritime Association, Boston Chamber of Commerce v. Ann Arbor Railroad Company*, 95 I.C.C. 539 (1925). No case, however, will be found in the Commission reports where recognition has been denied to the distance advantage of a competitively weaker port and that in a nutshell, is the position of Baltimore and Philadelphia in the present case as it was at Albany.

We submit, therefore, that the District Court was wrong in its history of the North Atlantic Ports Adjustment and equally wrong in its reading of the decisions of the Commission dealing with other port relationships.

III.

The District Court Erred in Making An Independent Finding That the Rates Proposed by the Northern Carriers Are Just and Reasonable.

The District Court, adopting the view of dissenting Commissioner WEBB, made its own finding that the proposed rates to the northern tier ports had been shown to be just and reasonable. The Commission made no such finding. On the contrary, the Commission found that the cost evidence in the record was not adequate to permit a finding that the rates would be compensatory (*supra*, p. 6).

In support of its finding the District Court said (R. 4000):

> ". . . the plaintiffs presented proof that the proposed rates are just and reasonable. In view of the minimal amounts of the proposed reductions (reduction in revenue from Chicago to Boston would be .08 cents per ton-mile on first-class traffic and .10 cents on Column 13 traffic, for example), the plaintiffs relied on a prima facie showing of revenues. There was testimony that, using representative origins and destinations and the proposed rates, for 96.8 per cent of all tonnage moving through the port of New York, the import traffic averaged a rate per ton of $19.20 and revenues per ton-mile of 2.47 cents, and that for export traffic these figures were $18.00 and 2.32 cents. In comparison the average revenue per ton-mile for Class I railroads in the United States is 1.384 cents.
>
> "The defendant railroads countered this evidence by showing that with respect to traffic through the port of New York the proposed rates were insufficient to return out-of-pocket costs. But, while it refused to find the rates compensatory, the Commission did find after restating and adjusting the cost evidence that 'the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs.' Equalization of Rates, *supra*, at 735.

> "On this evidence the plaintiffs certainly established prima facie that the proposed rate schedule is just and reasonable."

It will be seen that the District Court, in making its own finding that the rates proposed by the northern carriers are just and reasonable, relied primarily on the evidence as to revenues and on the Commission's finding as to out-of-pocket costs.

The evidence as to revenues need not detain us long. Whatever effect it might properly be given in the absence of specific evidence as to the cost of service, it can have no weight where the record contains cost studies which do demonstrate that the revenues, however great, barely exceed out-of-pocket costs. That is the case here, and in the face of such studies any inferences which might otherwise properly be drawn from the sort of testimony referred to in Judge SWEENEY's opinion simply fall to the ground.

It is true that the Commission did find that the revenues from the rates proposed by the northern carriers "would equal or exceed by a very small margin the estimated out-of-pocket costs" (R. 3797). But the Commission was careful to point out that this finding was limited to existing traffic only at the port of New York and concluded that the presentation of costs in the record by either side was not sufficiently comprehensive to permit a determination "whether the proposed rates would be reasonably compensatory" or whether "other traffic would be forced to absorb a larger portion of the constant costs in order to maintain a national transportation system conforming to the ultimate objectives of the national transportation policy" (R. 3797). Since, however, the Commission had considered the relationship question and had determined

that the existing differential rate structure was fair and that the rates proposed by the northern carriers were unlawful, the Commission made no finding as to whether the rates proposed by the northern carriers had been shown to be otherwise unlawful.

Appellants submit that in making its own determination that the rates had been shown to be just and reasonable the District Court far exceeded the proper bounds of judicial review as delimited by the decisions of this Court. In *Illinois Commerce Commission v. United States*, 292 U.S. 474, this Court said (p. 481):

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission."

Moreover, the power of the Commission to find rates unreasonably low even though compensatory has been well settled by this Court. For example, in *New York v. United States*, 331 U.S. 284, this Court said (p. 346):

> "If the Commission were powerless to increase rates to a reasonable minimum in order to eliminate an unlawful discrimination, unless existing rates were shown to be non-compensatory or unless ruinous competition would result, it would in some cases be powerless to prescribe the remedy for unlawful practices."

In *New York Central Railroad Co. v. United States*, 207 F. Supp. 483 (S.D.N.Y. 1962), Judge FRIENDLY said (at p. 494):

> "The Commission's present disapproval of the New York rates thus cannot be sustained on the basis on which its earlier disapproval of parity for Boston

was upheld in Boston & Maine R.R. v. United States, 153 F. Supp. 952, 960 (D. Mass. 1957). On the other hand, defendants are right that this does not settle the case against the Commission. If the Commission's power to condemn rates as too low were confined to situations in which the rates did not cover out-of-pocket costs, its power to control ruinous competition among railroads would be largely ineffective. Rate reductions, counter-reductions by a competitor, and further cuts by the first carrier in retaliation could go on unchecked until the rates reached the level of out-of-pocket costs." Locklin, Economics of Transportation 5th Edition, 1960, at 311."

IV.

Boston Is Not Entitled to Rates Lower than New York.

In the present case the northern carriers originally undertook to justify the proposed rates to all the northern tier ports as a group. They argued for equalization of rates to all North Atlantic ports and did not suggest that any one of the northern tier ports should be given preference over another. However, during the course of the hearings, Boston and the carriers which serve that port asserted an independent claim to Baltimore rates, even though the Commission should find that New York was not entitled to them. This claim was considered and rejected by the Commission in its original report, but the Department of Justice in its answer to the original complaint filed in the District Court took the position that the Commission had failed to give adequate consideration to the claims of each of the northern tier ports separately. Accordingly, in its report on reconsideration the Commission specifically dealt with each of the northern tier ports separately and reached the conclusion that whether considered separately or collectively the northern carriers had failed to justify the proposed rates.

So far as the group adjustment is concerned, the failure of the northern carriers to meet their burden of proof is, we submit, perfectly apparent for the reasons which we have stated. We submit that the northern carriers have also failed to justify the proposed rates to any of the northern tier ports separately considered. As to New York nothing can be added to what has already been said. The Commission has found that this giant among the northern tier ports completely overshadows its competitors without the need of any artificial equalization of rail rates in disregard of the geographical advantages of its rivals. Portland has made no attempt to justify the proposed rates; on the contrary, it has opposed the proposed equalization. Albany has completely failed to show that it would benefit in any way from the proposed rates.

There remains Boston. In the District Court the Boston interests argued strenuously that the carriers which served that port should be allowed to file rates at the Baltimore level even though the existing relationships between New York and the southern tier ports were maintained without change. As we have previously pointed out, this is not a new question. In 1912 the Commission was told that "Boston cannot live commercially without equal inland export and import rates with Baltimore" and at that time the Boston interests specifically asked the Commission to fix Boston rail rates at a level "lower than like rates to and from New York to the extent of the present differentials at Baltimore." The Commission refused this request, pointing out that it had no right to deprive New York of its natural advantages over Boston by fixing "arbitrary and artificial differentials." *Chamber of Commerce of N. Y. v. N. Y. C. & H. R. R. R. Co.*, 24 I.C.C. 55, 62.*

* See Appendix A *infra* pp. 84-87 for further quotations from this opinion.

Again, in 1925, the Commission said (*Maritime Association, Boston Chamber of Commerce v. Ann Arbor Railroad Company*, 95 I.C.C. 539, 565):

> "Complainants, however, are not seeking lower rates than New York, and it will hardly be contended that they could seek such rates under any provision of the interstate commerce act. * * * Certainly we are not warranted, in our determination of these matters, in disregarding differences in distance which are substantial and material when compared with the total hauls involved."

In *State of New Jersey v. Baltimore & O. R. Co.*, 245 I.C.C. 581 (1941), the port of Boston intervened in support of the claim of the State of New Jersey and the City of Jersey City to rates for the New Jersey side of New York harbor lower than those applicable to the New York side of the harbor. The effect of such an order would have been to give Boston lower rates than those applicable to the City of New York. The Commission dismissed the complaint on the ground that it would disturb the North Atlantic Ports Adjustment.

In the report on reconsideration in the present case the Commission pointed out that the average short-line distance to Boston from key points in differential territory exceeds that to New York by 117 miles and that the distance from Chicago to Albany is 184 miles less than to Boston, to which it is intermediate. The Commission then pointed out (R. 3854):

> "Boston's rates, as proposed, would be lower than the present rates to and from Albany, and also lower than the present rates to and from New York and Philadelphia. Rates lower to or from Boston than to or from the other ports just mentioned, over some

routes, would be in violation of the long-and-short haul provisions of section 4 of the Interstate Commerce Act."

Boston is really asking the Commission to use its powers to allocate to Boston traffic which would naturally flow to its rivals. It is not asking for equal treatment, it is asking for preferential treatment. This no carrier has the right to give it; much less the Commission. In *Texas & Pac. Ry. Co. v. United States*, 289 U.S. 627, this Court said (at p. 637):

> "A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel."

In the footnote which follows that statement, the Court says:

> "The Commission has recognized the same principle. Ashland Fire Brick Co. v. Southern R. Co., 22 Inters. Com. Rep. 115, 121; Chamber of Commerce v. New York C. & H. R. R. Co., 24 Inters. Com. Rep. 55, 63, 70, 75; Maritime Asso. v. Ann Arbor R. Co., 95 Inters. Com. Rep. 539, 565."

The two cases last cited in the footnote are, of course, those in which the Commission discussed the claim of Boston to preferential treatment over New York.

It is true as we have previously pointed out, that in important respects the *Texas & Pacific* case has been subsequently repudiated either by this Court or by act of Congress. However, on this limited point, the case still stands as good authority. See *New York v. United States*, 331 U.S. 284, 331-332; *New York Central Railroad Company v. United States of America*, 207 F. Supp. 483, 494 (S.D. N.Y. 1962).

CONCLUSION

The general objectives proclaimed by Congress in the national transportation policy embody in statutory form a principle which the Cooley commission recognized many years ago. In upholding the reasonableness of the agreement of 1877, the commission said (R. 1650):

> "While it is not the province of Government to build up cities for its people, it is its plain duty to permit the cities the people built to live; and it should so shape its own action as to allow every town, as far as possible and reasonable, to avail itself of all its natural and acquired advantages in adding to the prosperity, happiness and comfort of the whole community."

The Commission heeded that admonition. The District Court failed to do so. Its judgment should be reversed.

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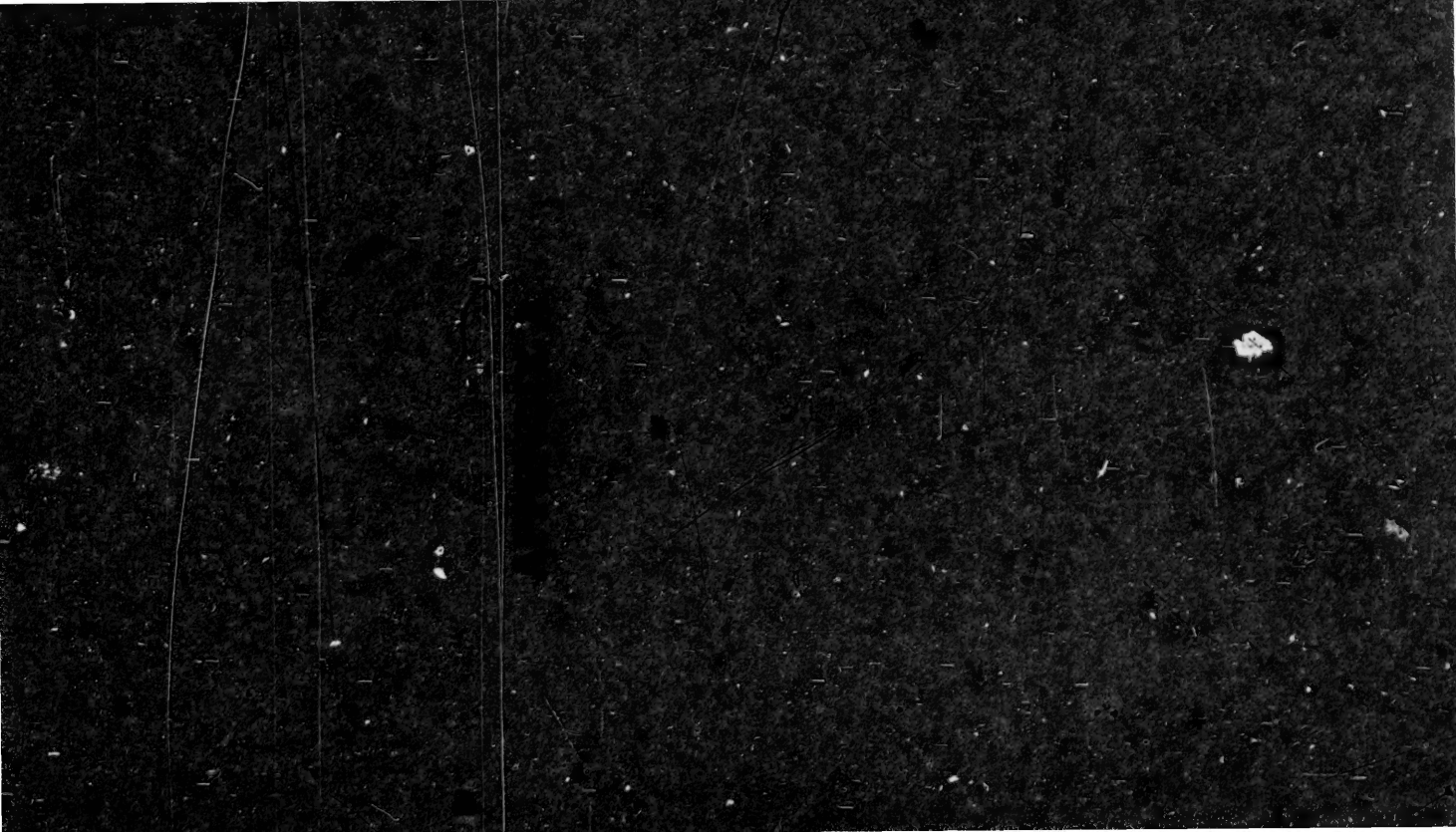

APPENDIX A

A. *The Origin of the North Atlantic Ports Adjustment*

Prior to 1875, four railroads had extended their lines across the Alleghenies. The New York Central lines reached Chicago in 1852; the Erie and Pennsylvania soon afterwards, and in 1874 the Baltimore & Ohio first entered Chicago over its own rails.* These four lines served the major North Atlantic ports of Boston, New York, Philadelphia and Baltimore, through which flowed most of the traffic between the United States and Europe.** Until 1876 the rates applying to shipments between these four ports and the territory west of the Alleghenies fluctuated with the tides of competition. For a time the Baltimore rates were ten cents per hundred pounds less than the New York rates,† but this was soon altered by unilateral reductions by carriers primarily serving New York. The result was a series of rate wars which ultimately produced a condition bordering on the chaotic.

To correct this situation, the carriers entered into an agreement in 1876 which provided that rates to Baltimore, Philadelphia and New York should be established upon the basis of actual distance from the inland point of origin to the several ports. This agreement continued in effect for only six weeks, whereupon the rate war was resumed.†† On April 5, 1877, the Presidents of the New York Central, Erie, Pennsylvania, and Baltimore and Ohio Railroads entered into an agreement which recited that it had been made

> "To avoid all future misunderstandings in respect to the geographical advantages or disadvantages of the Cities of Baltimore, Philadelphia and New York, as affected by rail-and-ocean transportation, and with the view of effecting an equalization of the aggregate cost of rail and ocean transportation between all com-

* *In the Matter of Differential Freight Rates to and from North Atlantic Ports*, 11 I.C.C. 13, at p. 17 (1905).

** Id. at p. 15.

† Id. at p. 16.

†† Id. at p. 16.

petitive points in the West, Northwest and Southwest, and all domestic or foreign ports reached through the above cities * * *."

After providing for fixed differences in the rates to the three named ports on all east-bound traffic, both domestic and export-import, from all competitive points beyond the western termini of the trunk lines of three cents less per hundred pounds to Baltimore and two cents less per hundred pounds to Philadelphia, the agreement provided that the rates to Boston should at no time be less than those to New York on domestic or foreign freights. As to west-bound traffic, the same differentials were established on third and fourth-class traffic, but on first and second class the differential was increased to eight cents less per hundred pounds from Baltimore and six cents less per hundred pounds from Philadelphia than the agreed rates from New York.*

The agreement of 1877 immediately came under investigation by the Hepburn Committee of the New York Legislature, and at a hearing held by that committee, the President of the New York Central Railroad said:

> "I think the railroads have done their full share towards the prosperity of the commercial interests of the State and City of New York from the very fact we are transporting goods in competition with other roads, 200 miles further for two cents more * * *."**

The President of the New York, Lake Erie and Western Railway Corporation testified that the agreement was a compromise, in securing which the New York carriers "thought we were very successful when we got it reduced

* The agreement is printed in full at R. 2903-1904.

** Proceedings of the Special Committee on Railroads, appointed under a resolution of the Assembly to investigate alleged abuses in the management of railroads chartered by the State of New York. New York, 1879, at p. 1075. See *Daish, The Atlantic Port Differentials* (1918), p. X.

from 6, 8 and 10."* The Vice President of the Erie, testifying at the same hearing, emphasized the fact that distance was a factor in fixing the differential. He said:

> "We are not called upon by any mercantile principle or usage to carry that extra distance for nothing, and there are no 272 miles of railroad that can be built for nothing, can be worked for nothing, that should be given to the public for nothing**."

B. *The 1880 Arbitration*

On June 3, 1880, the New York Central gave notice of its desire to modify the 1877 agreement "on the ground that the differences in rates adopted April 5, 1877, * * * were based upon the then existing ocean rates, with the view of equalizing shipments from common points west to common points in Europe, making at that time the rates substantially the same on all export business through the different ports; but that since that time reductions have been made in the ocean rates from Philadelphia and Baltimore, which bring them nearly on the same level with those from New York, thus giving the Southern ports greatly the advantage over New York on export freight." This matter was referred to Albert Fink, Commissioner of the Trunk Lines for investigation, who filed a report on December 1, 1881.† After reciting the facts quoted above, and after careful analysis of ocean rates, Mr. Fink concluded that "even if the principle to adjust inland rail rates on the exact basis of differences in ocean rates were adopted as correct, it would be impracticable to carry it into practice with justice to all parties.†† He went on to say:

> (pp. 29-30 of Daish)
>
> "The adjustment of railroad transportation rates has, so far, been considered from the standpoint of the rail-

*Id. at p. 1489. *Daish*, op. cit. p. XI.
**Id. at p. 3175. *Daish*, op. cit. p. XI.
† This report is printed in full in *Daish, The Atlantic Port Differentials* (1918) at pp. 9-63.
†† *Daish*, op. cit. p. 29.

road companies. The question at issue concerns in an equal degree the commercial communities competing with each other for the export grain trade. It is, therefore, necessary to consider it from the broader standpoint of the merchants or the commercial communities engaged in the trade. * * * It is not merely a question of railroad transportation rates, although that is, no doubt, a very important element.

"Assume, for the sake of illustration, that one of the ports possessed great commercial advantages, which, with equal transportation rates, would give it a decided preference, to such an extent that the whole export business would seek this port. Could it be expected that the other ports, less advantageously situated, and the railroads identified with them, would be willing to allow themselves to be debarred from participating in the commerce of the world; that they would allow their railroad facilities, their warehouses and elevators, their capital and investments, to lay idle, out of mere respect for the abstract principle that transportation rates to and through all ports must be the same, regardless of any and all other considerations that control trade and commerce.

Mr. Fink's suggested solution of the controversy was that the carriers should "agree upon a proper distribution of that traffic at its source, if possible, and then to allow it to flow to the different cities according to the natural laws of trade."* However, this suggestion was not adopted by the carriers. Instead, they referred the whole matter to the arbitration of a committee consisting of Messrs. Allen G. Thurman, E. B. Washburne and Thomas M. Cooley. On July 20, 1882, that committee filed a report which examined the whole question of the differentials with great thoroughness.** At the outset of its discussion, the committee remarked:

"It seemed to be taken for granted, in the arguments presented to us, that the existing differentials

* *Daish, op. cit.* p. 42.

** This important report is printed in full at R. 1027-1067.

had not been determined on any principle, but that they were the result of a compromise between the railroad companies, whereby they had purchased peace between themselves'."*

The committee then considered whether the rates at issue should be based on mileage, on cost of service or on an attempt to equalize the competitive advantages of the various ports. After examining the existing differential rate structure in the light of each of these competing principles, the Commission said:**

> "It only remains for us to state that no evidence has been offered before us that the existing differentials are unjust, or that they operate to the prejudice of either of the Atlantic seaport cities. Differential rates have come into existence under the operation of competitive forces; they bear some relation to relative distance and relative cost of service; they recognize as we think the relative advantages of the several seaports; and they are subordinate to the great principle which compels the carriers of property competing between the same points and offering equal facilities to their customers, to make the same rates. We therefore cannot advise their being disturbed."

C. *The Hampton Roads Ports Adjustment*

Thereafter the differentials continued in effect without further litigation for a period of approximately fifteen years, during which (and prior to the year 1900), the railroads serving the ports of Hampton Roads published rates at the Baltimore levels between the ports of Norfolk and Newport News and various localities in differential territory lying west of the Sandusky-Mansfield-Newark-Marietta line.†

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* R. 1636.

** R. 1666.

† See testimony of T. Jefferson, Jr.; R. 2720-2721.

D. *The New York Produce Exchange Case*

In 1887 the Interstate Commerce Act was placed on the statute books. Ten years later a group of New York merchants filed a complaint with the Commission charging that the North Atlantic Ports Adjustment unduly preferred Boston, Philadelphia, Baltimore, Newport News and Norfolk to New York.* The principle ground of complaint was that the agreement of April 5, 1877, was intended to equalize ocean rates, whereas "at the present time ocean freights upon grain, flour and provisions are substantially the same from all the ports."** The Commission found that so far as full cargo business was concerned "there is no appreciable difference in cost, and no appreciable difference in the ocean rate from the three ports, New York, Baltimore and Philadelphia."† As to grain carried at "berth rates," the Commission found that there was a difference in favor of New York over Philadelphia of from 1½ to 2 cents per hundred pounds; "and that about the same difference exists against Baltimore."††

The Commission then said:

> (p. 669) "The defendants do not justify these differentials upon the ground either of distance or cost of service. We do not express an opinion that they could be justified to their full extent upon either of these grounds. They certainly could not in the case of Norfolk and Newport News. But we do think that in this inquiry between the three localities, New York, Philadelphia and Baltimore, in determining whether there is an undue preference, the advantage which Philadelphia and Baltimore possess in the way of distance should be considered, and that the same is true of the additional expense of delivery at New York."

* *New York Produce Exchange v. B. & O. R.R. et al.*, 7 I.C.C. 612 (1898).

** 7 I.C.C. at 624.

† 7 I.C.C. at 626.

†† 7 I.C.C. at 630.

(p. 667) "Distance is frequently disregarded by carriers in the making of their rates. The Commission has held it may be under some circumstances properly disregarded to some extent. It has been repeatedly said, however, that distance ought, when possible, to be regarded, and we have never held that a carrier would be compelled to disregard it for the purpose of putting two communities upon a commercial equality."

(p. 678) "These differentials apply upon all classes of freight and accordingly upon all commodities. In the very nature of the case they cannot be abstractly just, but only fair in the aggregate result. Their purpose is to give to each line its fair share of export business. Many other commodities are exported besides those embraced in this proceeding. In case of grain the freight rate is a very large factor in its value, while in case of other exports it may be insignificant. A differential which determines the route by which grain shall be exported would have no effect whatever upon some other article. These higher grade exports go almost entirely to the port of New York, from which they find quicker service to all parts of the world, and from which they can only find communication with many parts of the world. Now, if the quantity of these exports, which the differential does not divert to Baltimore or Philadelphia, has been increased in late years, it is manifest that this offsets to that extent any increased diversion of grain to the outports. The freight rate which these other exports pay is higher, and it is therefore more for the interest of the carrier to transport them. The ocean rate is also higher, and the advantages to the port of New York in the way of attracting shipping are probably greater than arise from the exportation of grain. So it is by no means certain that more grain ought not to go through the outports to offset the increased exports of other kinds from New York."

Following this decision of the Commission, the carriers concerned agreed to reduce the differential on coarse grain

and wheat for export to one and a half cents for Baltimore and one cent for Philadelphia under New York.*

E. *The 1905 Arbitration*

In 1905 the commercial organizations of Boston, New York, Philadelphia and Baltimore appealed to the Commission by petition, asking that it examine the whole subject of differential rates to and from those four cities in the role of arbiter and "determine whether the present differentials should be abolished or if retained modified."** Commissioner PROUTY, speaking for all but one member of the Commission, after reviewing the history of the differential, said (at p. 18):

> "The agreement of 1877 had been intended, as already seen, to equalize the rates through the different ports, the lower inland rate being supposed to correspond to the higher ocean rate. The New York lines withdrew from this agreement upon the plea that while ocean rates had been distinctly higher from Baltimore and Philadelphia in 1877, they had become in 1880 practically the same.
>
> "Both Mr. Fink and the Advisory Commission found that ocean rates were higher from Baltimore and Philadelphia than from New York and attached much importance to this fact, but a careful reading of these reports apparently shows that in the opinion of their authors the difference in ocean rates was not the only factor which should be considered, partly for the reason that it was impossible to determine exactly what the ocean rate was, and partly because the thing to be equalized was not the rate but the advantages of transportation through the several ports."
>
> (p. 67) "While, however, it would be impossible to secure by the application of any inland differential the same rate through all the ports it would be possible

* *See, Export and Domestic Rates*, 8 I.C.C. 214, 228 (1899).

** *In the Matter of Differential Freight Rates to and from North Atlantic Ports*, 11 I.C.C. 13 (1905).

to say with confidence that if this were the proper basis of making the differential the present differentials are too high, *for they undoubtedly exceed the difference in ocean rates. In our opinion they always have from the very first.* While the Thurman Commission reported that rates from Philadelphia and Baltimore were higher than from New York by an amount substantially equaling the differentials, Mr. Fink, a much closer observer, with much better means of information, stated in his report of 1881 that the difference in ocean rates was only about one-half the differential from Philadelphia, and something more than one cent less than the differential from Baltimore. This Commission found upon the former hearing that the difference in ocean rates did not equal the differentials. We have now expressed the belief in our findings of fact that for the last seven years the difference in ocean rates has been materially less than the differentials. During all this time the inland differential has been in effect and for the last two or three years it has been strictly observed. It must follow, therefore, that the rate through Baltimore and Philadelphia has been distinctly lower than the rate through New York." (Emphasis supplied.)

(p. 77) "We have not considered westbound differentials applicable to import traffic since there are no facts in this record upon which to base an opinion. With respect to export differentials we conclude that the differential on flour both all-rail and lake-and-rail should be 2 cents per hundred pounds at Baltimore and 1 cent per hundred pounds at Philadelphia; that there should be allowed both Baltimore and Philadelphia a differential of $^3/_{10}$ of 1 cent per bushel on ex-lake grain; that otherwise the present differentials should remain in force. This is not a proceeding in which the Commission could make an order, nor do we intend to intimate that the facts appearing would justify an order in any proceeding. Our impression is that the above modifications would be fair to the various communities and lines of railway interested.

and that it is in the public interest that these differentials should be so adjusted that all the ports and the various lines serving them may fairly compete for this traffic."

F. *The 1912 Arbitration*

In 1912 the Commission once again reviewed the entire North Atlantic Ports differential rate structure. In this proceeding the Commission acted in a dual capacity. Its jurisdiction was first invoked in 1910 by the railroads serving the ports of Boston, New York, Philadelphia and Baltimore and the commercial bodies of Boston, Philadelphia and Baltimore which requested the Commission "to decide and advise as to the adjustment of the inland import rates from the several ports." This intervention was requested after a rate war had been precipitated as the result of a reduction in rates by the Boston railroads. Thereafter the Chamber of Commerce of the State of New York, filed a formal complaint alleging that the rates charged by rail carriers to and from the city and port of New York were unjust and unreasonable "in themselves, and relatively so as compared with competitive ports, more particularly Philadelphia, Baltimore, Newport News, Norfolk and Boston." The reports of the Commission show that the then existing differentials were approved as fair and proper with some modifications.*

The Commission said (24 I.C.C. at p. 62):

"The Boston interests assert that the Boston railroads are entitled by law and that it is their duty to meet the lowest export and import rates offered via any of the ports here considered, and in this position the Boston & Maine Railroad concurs. Boston asks, therefore, an order or an expression of opinion from the Commission to the effect that the inland rates on import and export traffic from and to the ports of Boston...

* *See Chamber of Commerce of N.Y. v. N.Y.C. & H.R.R.R. Co., et al.*, 24 I.C.C. 55, 674, and 27 I.C.C. 238; *In the Matter of Import Rates*, 24 I.C.C. 78, 678, and 27 I.C.C. 245.

Philadelphia, and Baltimore should be the same, and that they should be lower than like rates to and from New York to the extent of the present differentials at Baltimore. They state that it is conclusively shown that Boston can not live commercially without equal inland export and import rates with Baltimore. They ask 'the boon of free competition' in order that Boston may secure an equitable share of the export and import traffic. It is somewhat difficult to see how the fixing of arbitrary and artificial differentials can be tantamount to 'the boon of free competition.'

"They call attention to the long list of natural and acquired advantages existing at the port of New York, and from [illegible] argue that if Boston is deprived of its advantage of lower ocean and through rates it can not compete on even terms with New York any more than can Philadelphia or Baltimore. The advantages referred to are, a natural port, unlimited capacity for future development, the Erie Canal, fast and frequent steamship service, option market, guarantee of quality of export flour, banking facilities, credit market, ocean rates, and numerous established commercial and trade connections with foreign countries. Not doubting that New York has all of these advantages we inquire, Which of them has not come as a gift of Nature or as a result of judicious investment or commercial enterprise? And which if any of them may, as a matter of law, be taken from New York or nullified by arbitrary rail rate adjustments that are not founded in reasonableness measured by the recognized standards, and the absence of unjust discrimination?

p. 74 "It is our duty to see that shippers are accorded reasonable rates and that undue discrimination is not practiced against shippers, commodities, or communities. It is also our duty to consider the interests of all of the shippers and communities affected and to refrain from condemning discriminations which are not unjust. Much weight has always been given to rate adjust-

ments of long standing to which commercial conditions have adjusted themselves, and in this connection it is to be noted that Baltimore and Philadelphia have had lower rates than New York for more than 40 years.

(p. 75) "It is urged that Boston is as dependent as is Philadelphia or Baltimore upon the differential territory for its exports and imports, and the Boston interests join in the contention that the railroads should so adjust their rates as to insure movement of a certain or substantial part of the traffic through those ports. Neither the carriers nor the Commission has any right to undertake to so apportion the traffic between rival ports or cities. While recognizing the right of the carriers to conserve the interests of the ports and territories served by them, we can not consider the carriers as one great and single system. *In Re Advances In Coal Rates by the Chesapeake & Ohio Ry. Co.*, 22 I.C.C. 604.

"The Baltimore & Ohio and the Pennsylvania systems, reaching by their own lines so many of the important commercial centers in the middle west and so many of the lake ports and having their own boats on the lakes and hauling all of their New York traffic through either Philadelphia or Baltimore or both, control the rate situation between the territory here considered and Baltimore and Philadelphia. The competitive conditions at Baltimore and Philadelphia are created by these systems, and the rate situation to and from those ports is controlled by them. It was this control by these systems that led to the making of the differential agreement. We do not recognize such an agreement as lawful, but the conditions which brought it about are as strong to-day as they ever were and we find now, as we found in the *North Atlantic Ports* case, *supra*, that the Pennsylvania and the Baltimore & Ohio have the lawful right to maintain lower rates to and from Baltimore and Philadelphia than they contemporaneously maintain to and from New York. They would probably also have the right to make these rates the

same to and from all of those ports if they chose to do so.

"The Boston lines have an undoubted right to make such rates to and from Boston as their interests demand, subject only to the limitations that the rates must be reasonable; that they may not carry that traffic at less than the cost of the service and so unduly burden other traffic, and may not unjustly discriminate against other points which they serve or in whose traffic they participate.

(p. 76) "As before stated, we neither recognize nor consider the differential agreement as lawful. The law contemplates free competition and condemns any combination which restrains such competition. We repeat that defendants Baltimore & Ohio and Pennsylvania systems have a lawful right to maintain lower rates between this differential territory and Baltimore and Philadelphia than they contemporaneously maintain to and from New York. The New York lines and their connections have a right to meet the competition so created at Philadelphia and Baltimore and which is beyond their control, while at the same time maintaining higher rates to and from New York. We think that as to this traffic, it would not be unjustly discriminatory for defendants to maintain the same rates to and from New York and Boston. We are not to be understood as holding that the present rate adjustment will for all time or for any particular period of time be just and reasonable, but we can not find that reasonable differences in rates as between Philadelphia and Baltimore on the one hand and New York on the other hand unjustly discriminate against New York. We find no justification for lower rates to and from Boston than to and from New York."

G. *The Portland Rates*

Sometime between the final decision on reconsideration of that case in 1913 and February 28, 1922, the rail carriers serving Portland, Maine, published import rates to differ-

ential territory over Canadian routes. At that time Portland was served by three railroads, the Canadian National (Grand Trunk New England Lines), Maine Central, and Boston and Maine. Both Canadian National and Maine Central moved traffic from Portland to differential territory via Canadian routes. Portland thus was in direct competition with the Canadian ports of Montreal, St. John's and Halifax, and, being an ice-free port in winter, served as winter port for Canada. All of these Canadian ports were served by Canadian carriers which had published Baltimore rates on imports moving to differential territory, and this was the reason why Portland was put on the Baltimore basis on import traffic moving via Canadian routes. Other traffic remained on the same basis as Boston and New York.*

H. *The Boston Case*

In 1922 a complaint was filed with the Commission by various civic and commercial bodies of Boston and other New England cities. In *Maritime Association, Boston Chamber of Commerce v. Ann Arbor Railroad Company*, 95 I.C.C. 539 (1925), the object of this complaint is succinctly stated by the Commission as follows:

> (p. 541) "Complainants do not contend that the rates attacked are inherently unreasonable; the issue is one of relationship. Although they ask for Boston and the other New England ports rates not exceeding those applicable between differential territory and the various ports named, what they in reality desire is that all differences in the import and export rates shall be abolished. They want equalization of rates, and it is immaterial to them how that equalization is accomplished. Boston and New York are on a parity with respect to export and import rates from and to differential territory. Complainants do not ask that the export and import rates to and from Boston be made lower than the like and contemporaneous rates to and from New York."

* See testimony of Merrow and Langlois, R. 2360-2373, 2374-2383.

There followed a full discussion of the existing differential rate structure, in the course of which the Commission said:

(p. 544) "Complainants say that the port differentials had their origin in an endeavor to compose rate wars and controversies between the carriers under bygone conditions, are arbitrary, were not intended to reflect, and do not reflect transportation conditions. A detailed history is given in Appendix B. Complainants assert that arbiters in the past, and we ourselves, have recognized these differentials as temporary expedients to be modified or abolished when they should prejudicially affect the natural flow of commerce to the ports. They contend that, notwithstanding efforts of those interested in the welfare of Boston to maintain and develop it as a port, the differentials have been a bar to its development, have reduced export and import traffic between differential territory and Boston almost to the vanishing point, and have prevented the securing of bulk or dead-weight cargo, such as grain and grain products, the lack of which accounts for the absence of satisfactory trans-Atlantic steamship service from and to Boston.

"Prior to the entry of the United States Shipping Board, Emergency Fleet Corporation, into ocean carriage the effect of the differentials is said to have been offset and nullified by shrinkage of ocean rates in corresponding amounts. Thus the rates between inland points of the United States and foreign ports were equalized through the north Atlantic ports. Upon this record the policy of the United States Shipping Board is to make the ocean rates to and from the north Atlantic ports uniform. This equalization of the ocean rates to and from the ports complainants offer as a reason for like equalization of the rail rates to and from the same ports."

(p. 554) "After careful consideration of the present record and of the conclusions reached in prior decisions with reference to this matter, we are of the opinion

that for many years prior to the World War there was a generally prevailing policy, except with respect to full cargo rates on grain, which were of minor importance, to offset the inland rail differentials in whole or in part by differences in the ocean rates to and from the north Atlantic ports. On the other hand appears that, since the World War at least, it has been and is now the generally prevailing policy to equalize these ocean rates. Apparently this change of policy was gradual rather than abrupt, and it is not possible on this record to fix the date when the change took place."

* * * * * *

(p. 554) "There is nothing to indicate, however, that in the fluctuations of the ocean rates the inland rail differentials are now taken into consideration. *It does not appear that Boston now gains any advantage whatever by reason of its shorter ocean route, or that Philadelphia or Baltimore suffers any disadvantage by reason of its longer route.*" (Emphasis supplied.)

(p. 563) "What is said as to the advantages of New York in comparison with the southern ports in general applies, although with somewhat less force, to the advantages which New York enjoys in comparison with the other north Atlantic ports. It is evident that what Baltimore and Philadelphia particularly prize are their differentials, not under Boston, but under New York. It is the competition of the latter port that they chiefly fear, and it is not at all unlikely that a proposition to give Boston also a differential under New York would, if it could be made, meet with less objection upon the part of Baltimore and Philadelphia than the present proposition to place all four ports upon the same basis."

(p. 565) "It is conceivable, for example, that it might be in the public interest to establish lower rates on export and import traffic to and from Boston, Philadelphia, and Baltimore than to and from New York. Complainants, however, are not seeking lower

rates than New York, *and it will hardly be contended that they could seek such rates under any provision of the interstate commerce act.* The question which we are facing is whether the rates under attack violate, in the respects alleged by complainants, the law which we administer. We have no arbitrary power to do what may seem to be in the public interest, but only such powers as are conferred by statute, and here our only duty is to determine whether the rates under attack are unreasonably high or low and whether they unduly prejudice the New England ports and unduly prefer the other ports named. (Emphasis supplied.)

"In passing upon the reasonableness of rates or in determining whether or not undue prejudice and preference exist, it is well settled that cost of service is a factor which must be taken into consideration. There are other factors which have weight, but cost of service is one of the most important. *Certainly we are not warranted, in our determination of these matters, in disregarding differences in distances which are substantial and material when compared with the total hauls involved.* It is true that there are many instances in the rate structure where distance seems to have been given little or no consideration and that rates are often blanketed over great areas. But these situations are either the product of common consent, so that they are not subjected to the tests of the law, or they result from competitive influences. (Emphasis supplied.)

"These competitive influences are frequently encountered and explain many of the situations which complainants have brought to our attention where rates and distances are out of accord. The situation at Hampton Roads may be taken as an illustration. The distances from points in differential territory to Norfolk are in general considerably greater than they are to Baltimore, yet to a large extent the export rates and the domestic rates, and to a lesser extent the import rates, are the same to both ports. This comes about because the Chesapeake & Ohio and the Norfolk &

Western, particularly the former, have direct lines to Norfolk from certain points in differential territory and do not serve Baltimore, except in connection with circuitous routes. *If they constituted or participated in rate making routes to Baltimore as well as to Norfolk, we might, upon complaint, require greater observance of distance in the rates to these ports.* Having no control over the Baltimore rates, they may equalize these rates at Norfolk without being guilty of unduly preferring Norfolk over Baltimore. We have held that we can not prohibit carriers from meeting competition in this way so long as they are not guilty of undue preference and prejudice and so long as they do not charge rates which are so unreasonably low that they burden other traffic. On the other hand, we can not require carriers to meet competition. (Emphasis supplied.)

(p. 567) "The port differentials are arbitrary. They are fixed and uniform. Except on the first two classes westbound, they are not graded to correspond with the different class and commodity rates and have not fluctuated with fluctuations in those rates. It may be conceded that they are the result of compromise, arbitration, and agreement resorted to as the only means so far found of averting rate wars. They do not accurately reflect transportation conditions, first, because they are uniform, and second, because the lesser distances from differential territory to Philadelphia and Baltimore as compared with New York and Boston are reflected only in part. * * *

"In the present proceeding there is no evidence that the rates under attack are either unreasonably high or unreasonably low. The real issue is whether undue preference and prejudice exist. *In view of the very substantial advantages in distance from differential territory which Philadelphia and Baltimore enjoy, as compared with New York and Boston, and as compared with the total hauls, we are unable to find that there is anything unlawful about the port differentials in*

favor of Philadelphia and Baltimore. Compared with the advantages in distance the present differentials in many cases are relatively small. (Emphasis supplied.)

(p. 574) "* * * there are many other points in differential territory where the routes to these Canadian ports are made up in part of lines within the United States which have control over the rates to and from Boston. *In such instances, the differences in distance amply warrant a finding of undue prejudice against Boston, provided the evidence shows that Boston is injured by the present relationship.* In our opinion, the record is lacking in such evidence. It does not appear that St. John and Halifax attract any substantial amount of import and export traffic to and from differential territory. In default of such evidence, we are unable to make a finding that the present adjustment of rates to these Canadian ports results in undue prejudice to Boston. (Emphasis supplied.)

"Very much the same situation exists with reference to the south Atlantic and Gulf ports. To some extent these ports are reached from points in differential territory by lines of railroad which have no control over the rates to Boston. In such instances, there is no basis for a finding of undue preference of the south Atlantic and Gulf ports and undue prejudice to Boston. In other instances, the haul from the point in differential territory to the Ohio River, at least, is performed by a carrier which can control the rate to Boston. *In such cases, in view of Boston's advantage in distance and transportation conditions, there is a basis for a finding of undue preference and prejudice provided it can be shown that Boston suffers injury from the present relationship.* In our opinion, the record does not contain evidence which indicates that the south Atlantic and Gulf ports attract a substantial amount of export traffic from differential territory which would, if the rate adjustment were corrected, be likely to move through Boston or other north Atlantic ports. In de-

fault of such evidence we are unable to make a finding of undue preference and prejudice with respect to the rates to these south Atlantic and Gulf ports. (Emphasis supplied.)

"Upon the issues presented and the record made we find that the rates assailed are not unjust, unreasonable, or unduly prejudicial to the New England ports or unduly preferential of the other ports as alleged."

I. *The Baltimore Case*

In the latter part of 1928 the Baltimore Chamber of Commerce complained to the Commission that the differential rate adjustments were too low to reflect the cost advantages of Baltimore and asked that the carriers involved be required to increase them. In *Baltimore Chamber of Commerce v. Ann Arbor R.R. Company, et al.*, 159 I.C.C. 691, (1929), the Commission by a vote of 7 to 4 refused to grant the relief requested. The report of the majority said:

(p. 696) "The present differentials have been in effect for many years, as heretofore stated. When originally established only a limited consideration was given to differences in distance and terminal services and costs. At no time since have such differences been considered as determinative of the proper measure of the differentials, which have been many times approved by us. As no good reason appears why we should now accept complainant's theory and make these differentials reflect differences in cost of that part of the terminal services that take place beyond the rail ends, it seems unnecessary to further refer to the mass of so-called cost-evidence of record. Complainant has made no attempt to show the relative terminal costs up to the rail ends at New York and Baltimore or to show the relative costs of line-haul transportation to those ports, except by a comparison of rates and distances. If the port differentials should reflect differences in cost only, which has not been the

case heretofore, they should reflect the differences in cost of all the transportation, including the line-haul transportation and all terminal services, whether performed on the rails or beyond the rail ends. While cost of service is important in determining the measure of rates, it never has been the sole consideration."

Commissioner EASTMAN, who was one of the four Commissioners dissenting, said:

(p. 704) "Our duty here is to consider the facts as developed of record, in the light of the statutory law which we administer. Summarizing these facts, it is shown, I believe:

1. *That, with the exception of ex-lake grain from Buffalo, the existing differentials, Baltimore under New York, are fully justified by differences in the rail service alone to and from these ports.* (Emphasis supplied.)

2. That the ultra-rail service, which has never been considered in any of the previous port differential cases to the extent now possible, is much more extensive and expensive at New York than at Baltimore, the excess in cost being in general materially greater than the existing differentials."

J. *The Domestic Class Rates Adjustment*

In 1930 the Commission ordered a general readjustment of domestic class rates in the east. The previously existing differential rate structure was abandoned insofar as domestic rates were concerned and a wholly new adjustment based solely on distance was substituted in its place. The result was that on domestic movements Baltimore's geographical advantage over competing North Atlantic ports was given much greater recognition.* However, as a result of this readjustment the domestic rates generally were less than the existing port rates, and to meet this situation the

* See *Eastern Class-Rate Investigation*, 164 I C C 314 (1930).

railroads established new port rates based on the domestic rate to Baltimore, to which were added the former differentials in order to make the rates to and from Philadelphia and New York. As a result of this readjustment which became effective in 1932, the port rates as a whole became lower than the corresponding domestic rates.*

K. *The Albany Case*

Thereafter, the Albany Port District Commission filed a complaint charging that the new rate structure was unduly prejudicial to Albany and unduly preferential of the other North Atlantic ports. In *Albany Port District Comm. v. Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, at pp. 155-156 (1936), the Commission upheld this complaint and found that Albany was entitled to the same rates to and from differential territory as Philadelphia. While stating that distance per se was not controlling, the Commission noted that the average distance between those two ports and all key points in differential territory was almost the same (219 I.C.C. 165) and, as the Commission noted in its report on reconsideration in the present case, this "was an important consideration in prescribing the described port relationship" (R. 3847-3848).

L. *The Philadelphia Case*

In 1938 the City of Philadelphia and other Philadelphia interests filed a complaint claiming that the rates applicable on import-export, coast-wise and intercoastal traffic between that port and points in trunk line, central and western trunk line territories were unjust and unreasonable, unduly prejudicial to the port, and unduly preferential of other Atlantic and Gulf ports.** The Commission said (p. 25):

"Taking as a basis of comparison the domestic rates which were prescribed by us upon consideration of

* *Albany Port District Comm. v. Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, at pp. 155-156 (1936); *City of Philadelphia v. Baltimore & O. R. Co.*, 231 I.C.C. 21 (1938), at p. 23.

** *City of Philadelphia v. Baltimore & O. R. Co.*, 231 I.C.C. 21 (1938).

relative transportation conditions, it appears that Baltimore's port differential under Philadelphia is less by about 2.7 cents on the average than it would be if it were on the domestic basis. Certainly this does not indicate that the adjustment complained of gives Baltimore an undue advantage over Philadelphia. * * *"

(p. 34) "The differential port-rate adjustment at the ports of Boston, New York, Philadelphia, and Baltimore is the outgrowth of a long period of competitive strife. The relations between these port rates have stood unchanged for many years and should not be overthrown except upon definite proof that they are unlawful. We have repeatedly refused to disturb them and no evidence has here been presented which would warrant a different course.

"The relation between the Philadelphia rates and the Norfolk rates in some respects might be difficult of justification if the same carriers were responsible for both sets of rates, but this is not the case. For the same reason the relatively lower rates between the south Atlantic and Gulf ports and the western part of central territory than between Philadelphia and the same territory cannot be said to be unlawful. There is no showing that the rates at Norfolk or at the southern ports are unreasonably low. The import rates from the Canadian ports are relatively lower than from Philadelphia but the water competition on the St. Lawrence River and the Great Lakes is a circumstance affecting the traffic from those ports and not encountered at Philadelphia. With respect to Albany we have in a recent case fixed the relation between that port and Philadelphia in the port-rate adjustment. No doubt as to the correctness of that decision is raised by the present record."

M. *The New York Harbor Case*

In 1941 the State of New Jersey and City of Jersey City, joined by the Boston Port Authority, sought to establish higher rates for the New York portion of New York

harbor than for the New Jersey portion.* The effect of such an order would have been to give Boston lower rates than those applicable to the New York side of the harbor. The Commission dismissed the complaint, saying (at p. 591):

> "The assailed rates on water-borne traffic reflect relations to most of the other north Atlantic ports as fixed in 1882 and since then repeatedly found not unlawful by us. Disturbance of the present parity between the two sides of New York harbor as sought by complainants and the Boston intervenor would most likely precipitate a chaotic situation as between the north Atlantic ports similar to that which existed prior to 1882."

N. *The Ex-Lake Grain Cases*

Since 1941 the differential applicable to the movement of ex-lake grain from Buffalo to the North Atlantic ports has been eliminated.** But while this differential may in its origin have borne some relation to the North Atlantic Ports differential "It seems reasonably certain that the Buffalo differentials have, during the years, become entirely independent of the central-territory adjustment and cannot now be supported by the past or present history of, or the reason for the latter."† In *Maritime Asso., Boston Chamber of Commerce v. A. A. R.R. Co.*, 126 I.C.C. 199 (1927), at page 214, the Commission said:

> "Viewed either from the standpoint of history or that of the inherent nature of the traffic moving thereon, the ex-lake grain rates cannot be considered an integral part of the system of port differentials as a whole. * * *"

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* *State of New Jersey v. Baltimore & O. R. Co.*, 245 I.C.C. 581 (1941).

** *See Port of New York Authority v. Baltimore & O. R. Co.*, 248 I.C.C. 165 (1941); *Export Grain from Buffalo to New York*, 278 I.C.C. 31 (1950); *New York Central R. Company v. United States*, 99 F. Supp. 804 (D. Mass. 1951), affirmed 342 U.S. 880; *Export Grain from Buffalo to New York*, 282 I.C.C. 647 (1954).

† *Port of New York Authority v. Baltimore & O. R. Co.*, *supra*, at p. 168.

O. *The Iron Ore Cases*

Finally, reference should be made to the prolonged and, as yet, inconclusive litigation over rates on iron ore moving from North Atlantic ports to certain points in Central Territory.* As Judge FRIENDLY has pointed out, these iron ore cases differ significantly from the present proceeding.**

* See 291 I.C.C. 527 (1954); 299 I.C.C. 195 (1956); 151 F. Supp. 258 (D. Md. 1957); 153 F. Supp. 952 (D. Mass. 1957); 355 U.S. 175 (1957); 314 I.C.C. 149 (1961); 200 F. Supp. 944 (S.D. N.Y. 1961), 207 F. Supp. 483 (S.D. N.Y. 1962), ___ F. Supp. ___ (D. Md., decided Dec. 19, 1962).

** *New York Central Railway Company v. United States*, 207 F. Supp. at p. 487.

APPENDIX B

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The National Transportation Policy (Preamble to 49 U.S.C. 1) and the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1 *et seq.*), provide as follows:

NATIONAL TRANSPORTATION POLICY

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

* * * * * * *

"Sec. 1. (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

* * * * * * *

"Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * * * *

"Sec. 4. (1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing

provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

* * * * * * *

"Sec. 15 (1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly

preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * * * *

Sec. 15 (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but

not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Sec. 15a. (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed, to the need, in the public interest, of adequate and efficient

railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."